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GROUP BOYCOTTS—PER SE OR NOT PER SE, THAT IS THE QUESTION

*Ann Graf McCormick**

INTRODUCTION

Section 1 of the Sherman Antitrust Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[1] Early judicial construction of this provision inter-

* B.A., Bucknell University; J.D., Seton Hall University; Member, New Jersey Bar.

[1] 15 U.S.C. § 1 (1970), *as amended*, 15 U.S.C.A. § 1 (Supp. V 1976). An "Act to Protect Trade and Commerce against unlawful Restraints and Monopolies," popularly known as the Sherman Antitrust Act, was passed by Congress in 1890. Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1–7 (1970), *as amended*, 15 U.S.C.A. § 1 (Supp. V 1976)). In Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911), the Court looked to the congressional intent in enacting the statute and noted that it

> was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

See also Apex Hosiery Co. v. Leader, 310 U.S. 469, 491–93 (1940). In Northern Pacific Ry. v. United States, 356 U.S. 1, 4 (1958), the Court stated that "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." The Court went on to note that this statute

> rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id. See also United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 & n.15 (1940); Comment, *A Re-examination of the Boycott Per Se Rule in Antitrust Law*, 48 TEMPLE L.Q. 126, 127–28 (1974). It has been surmised that the Act was drafted in broad terms in order that it would be inter-

preted the language literally, holding that the prohibition extended to every contract, combination, or conspiracy in restraint of trade, regardless of the reasonableness of the restraint.[2] The consequences of such an inflexible approach soon became apparent,[3] and a variety of inroads were made upon this standard.[4] Then, in 1911, the "rule of reason" was first enunciated in *Standard Oil Co. v. United States*[5]

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preted "in the light of its legislative history and of the particular evils at which the legislation was aimed." Apex Hosiery Co. v. Leader, *supra* at 489 & n.10.

[2] This construction is best exemplified by the decision of Justice Peckham in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). In determining "the true construction of the statute," the issue was framed as follows:

> What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature?

Id. at 327. The Court firmly rejected the argument that because the common law prohibition against restraints of trade encompassed only unreasonable restraints of trade, the statute was meant only to prohibit unreasonable restraints of trade. *Id.* at 327–29, 340–41. In declining to insert judicially the word "unreasonable" into the statute, the Court, speaking through Justice Peckham, stated:

> [W]e are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the langauge it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. . . . If the act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable.

Id. at 340. *See also* United States v. Joint Traffic Ass'n, 171 U.S. 505, 573–78 (1898). For an interesting discussion of the legal philosophy of Justice Peckham relative to the Sherman Antitrust Act see 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 2–6, 13 (1973) [hereinafter cited as HANDLER].

[3] *See* 1 HANDLER, *supra* note 2, at 4–6. It has been stated that Justice Peckham's "literal reading" of the Act "would have made the statute inadministrable, as he himself soon learned with more experience in Sherman Act litigation." *Id.* at 13.

[4] The decisions in Hopkins v. United States, 171 U.S. 578 (1898), and Anderson v. United States, 171 U.S. 604 (1898), both of which were written by Justice Peckham, have been noted as examples of the Court's failure to follow the literal approach of the earlier cases. 1 HANDLER, *supra* note 2, at 5–6. For a discussion of *Hopkins* and *Anderson* see note 15 *infra*.

[5] 221 U.S. 1 (1911). The Court, speaking through Justice White, first determined that the term "restraint of trade" had to be analyzed with reference to its meaning at common law. *Id.* at 50–51. The Court noted that, as a principle of statutory construction,

> where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.

and was further explained in *United States v. American Tobacco Co.*[6] Under this approach, only those restraints which were unreasonable were to be prohibited.[7] Yet, as the case law developed, certain restraints were again declared to be per se violations of the

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Id. at 59 (footnote omitted). The Court then determined

> that the standard of reason which had been applied at the common law and in this country . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

Id. at 60. The Court did not overrule its prior decisions in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), and United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898), which had advocated a literalist approach to the interpretation of the statute. *See* Thomsen v. Cayser, 243 U.S. 66, 84–85 & n.1 (1917). Rather, the Court stated that the agreements attacked in those cases were so "clearly" prohibited by the statute that "they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency" of the contracts. 221 U.S. at 65.

That the attempt to make these decisions compatible is mere sophistry is exemplified by Justice White's dissenting opinion in United States v. Trans-Missouri Freight Ass'n, *supra* at 343–44, wherein he first noted that the majority decision accepted the hypothesis that the provisions of the contract under review were reasonable and then stated that

> [t]he theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the act of Congress . . . .

Id. at 344. Justice White also dissented from the holding in United States v. Joint Traffic Ass'n, *supra* at 578. In Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23, 24 (1964), the author noted that the two approaches were inconsistent despite protests to the contrary. For a further discussion of the legal approach to the Sherman Antitrust Act taken by Justice White see 1 HANDLER, *supra* note 2, at 6–9, 13.

[6] 221 U.S. 106 (1911). In this case, the Court reaffirmed the analysis and holding expressed in *Standard Oil. See id.* at 178–81. For a discussion of these two "rule of reason" cases see generally Raymond, *The Standard Oil and Tobacco Cases*, 25 HARV. L. REV. 31 (1911).

[7] In Board of Trade v. United States, 246 U.S. 231, 238 (1918), the Court articulated the essence of the rule of reason by stating:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

For a concise discussion of the rule of reason see Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1151–52 (1952).

Sherman Act.[8] Restraints such as price fixing,[9] division of markets,[10]

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[8] In Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958), the Court set forth the rationale behind the per se rule:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

For a concise discussion of the per se rule see Oppenheim, *supra* note 7, at 1150–51.

[9] United States v. Trenton Potteries Co., 273 U.S. 392, 397–98 (1927). The Court held that a price-fixing agreement among manufacturers and distributors of vitreous pottery fixtures who controlled 82% of the national market was a per se violation of the Sherman Act. Thus, it was deemed proper to withdraw from the jury the issue of the reasonableness of the restraints. *Id.* at 394, 401–02. In United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940), the Court delineated the breadth of this illegality by stating:

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.

Accord, Albrecht v. Herald Co., 390 U.S. 145, 152–53 (1968) (combination to fix maximum resale price is illegal per se); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951) (combination to fix maximum resale price is illegal per se). In United States v. Container Corp. of America, 393 U.S. 333, 336–38 (1969), the Court, although not expressly stating that it was per se illegal, held that an exchange of price information relating to a fungible product with an inelastic demand, in an oligopolistic market, was violative of section 1 of the Sherman Act. The manufacturers of the product controlled 90% of the market and the Court found that the information exchanged had the effect of stabilizing prices. *Id.* at 336.

Although these cases involved horizontal restraints of trade, vertical price-fixing agreements have also been held to be per se illegal. *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 44–47 (1960) (vertical combination to fix resale prices illegal per se); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 719–21 (1944) (vertical combination to fix resale prices illegal per se).

[10] Horizontal agreements to divide territories have been held to be per se violations of section 1 of the Sherman Act. *See, e.g.*, United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972). Vertical arrangements dividing territories were discussed by the Court in White Motor Co. v. United States, 372 U.S. 253, 261 (1963), wherein it declined to hold a vertical combination to divide territories illegal per se because it "kn[e]w too little of the actual impact of . . . that restriction . . . to reach a conclusion on the bare bones of the documentary evidence before" it. However, in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967), the Court noted that

> where a manufacturer *sells* products to his distributor subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results. And . . . the same principle applies to restrictions of outlets with which the distributors may deal and to restraints upon retailers to whom the goods are sold.

(Emphasis in original.) The Court stressed that "*absent* price fixing and in the presence

tying arrangements under certain circumstances,[11] and group boycotts[12] have come to be included in this category.

This article will examine that restraint of trade which is categorized as a group boycott or concerted refusal to deal.[13] Although the United States Supreme Court has repeatedly stated that group boycotts are per se violations of section 1 of the Sherman Act, the lower federal courts have continually devised methods to circumvent such a holding. In attempting to determine whether group boycotts should be classified as per se restraints, an initial inquiry must be made in order to ascertain whether this controversial restraint is denominated per se in anything more than name, and, if this is the case, why the per se label has been ignored.[14]

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of adequate sources of alternative products to meet the needs of the unfranchised," it would still determine the legality of vertical restrictions on distribution under a rule-of-reason analysis when the manufacturer retained ownership of the goods. *Id.* at 379–81 (emphasis in original).

[11] A tying arrangement is an agreement whereby one party agrees to sell a particular, desired product (the tying product) on the condition that the purchaser also buy some other item (the tied product) or not obtain that item from another seller. *See* Northern Pacific Ry. v. United States, 356 U.S. 1, 5–6 (1958). Tying arrangements are per se illegal

> whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected.

Id. at 6. *Accord*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608–09 (1953); International Salt Co. v. United States, 332 U.S. 392, 396 (1947).

Tying arrangements can also be challenged under the narrower standards of section 3 of the Clayton Act, 15 U.S.C. § 14 (1970). Such an arrangement will be held to have violated section 3 of the Clayton Act if the seller has "a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained." Times-Picayune Publishing Co. v. United States, *supra* at 608 (emphasis in original). It is easier to establish that a tying arrangement violates section 3 of the Clayton Act than it is to show that it violates section 1 of the Sherman Act. *See id.* at 608–09. If the arrangement involves a service, however, it must be challenged under section 1 of the Sherman Act, because section 3 of the Clayton Act does not cover services.

[12] *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127, 145–47 (1966); Silver v. New York Stock Exch., 373 U.S. 341, 347–48 (1963); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659–60 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211–12 (1959); Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 625 (1953); United States v. Columbia Steel Co., 334 U.S. 495, 522–23 (1948).

[13] For discussions on the legal standard applied to group boycotts see Horsley, *Per Se Illegality and Concerted Refusals to Deal*, 13 B.C. IND. & COM. L. REV. 484 (1971); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 RUTGERS L. REV. 773 (1974); Comment, *supra* note 1; 51 NW. U.L. REV. 628 (1956).

[14] A discussion of the cases involving the utilization of a boycott in order to implement and enforce a resale price maintenance program are beyond the scope of this article. In those cases, the Court dealt with the restraint primarily in terms of the price-

The historical development of early Supreme Court cases involving challenges directed against group boycotts will be reviewed in order to determine if the Court ever unequivocally stated, in those cases, that group boycotts are per se illegal. Although the cases are not necessarily similar factually, an examination of those decisions reveals certain common factors. Generally, there is an emphasis on the intent and purpose of the combination and its economic strength, yet analysis of the impact of the restraint upon the market is minimal. Furthermore, extensive legal analysis is often noticeably absent or ambiguous. The existence of such ambiguity is made more apparent by a comparison to the Court's relatively clear-cut per se approach in cases involving price fixing.

SUPREME COURT DECISIONS PRIOR TO 1948

Among the early cases[15] in which the United States Supreme Court directly addressed the issue of whether a group boycott was

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fixing element rather than the boycott facet. *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 46–47 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 719–21 (1944).

[15] Two of the earliest cases in which the United States Supreme Court was presented with the issue of the legality of a group boycott under the Sherman Act were Hopkins v. United States, 171 U.S. 578 (1898), and Anderson v. United States, 171 U.S. 604 (1898). In *Hopkins*, the defendants, all of whom were members of an association called the Kansas City Live Stock Exchange, were commission merchants dealing in livestock. 171 U.S. at 579. Among other allegations, the complaint charged that the actions of the association members, in refusing to deal with nonmembers, were a restraint of trade violative of the Sherman Act. *Id.* at 581–82. The Court avoided the issue of the legality of the boycott by answering, in the negative, the threshold question of whether the business of the defendants was a part of interstate commerce or had a direct effect thereon. *Id.* at 586–87, 592, 603–04.

In *Anderson*, which was decided on the same day as *Hopkins*, suit was brought against the members of the Traders' Live Stock Exchange. 171 U.S. at 605. The defendants, who were buyers of livestock, were charged with refusing to deal both with traders who were not members of the association and with commission merchants who did business with non-member traders. *Id.* at 612. Since the *Hopkins* Court, in deciding the interstate commerce issue, had emphasized the fact that the defendants "d[id] not purchase the cattle themselves," 171 U.S. at 590, the *Anderson* Court could not so easily dispose of the case on interstate commerce grounds. *See* 171 U.S. at 612. The Court held that even if the defendants were involved in interstate commerce, the effect of any restraint upon such commerce "can only be in a very indirect and remote manner." *Id.* at 615, 617. Thus, the Court again skirted the issue of the legality of the concerted refusal to deal.

To place these decisions in the proper perspective, it should be noted that they were written by Justice Peckham, who was the main proponent of the literalist interpretation of section 1 of the Sherman Act. *See* notes 2–3 *supra* and accompanying text. It has been stated that the approach taken in deciding these cases "foreshadowed the rule of reason eventually adopted in *Standard Oil*." 1 HANDLER, *supra* note 2, at 5. In Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911), Justice White stated that the differ-

violative of section 1 of the Sherman Act were *Montague & Co. v. Lowry*[16] and *Loewe v. Lawlor*.[17] In *Montague*, the plaintiff tile dealer objected to the by-laws of the defendant association which forbade the sale of tiles by a member manufacturer to any non-member dealer at any price. In addition, the sale by an association dealer to a non-member dealer was prohibited except at a set price greatly in excess of the price at which a member dealer would sell to another association dealer.[18] The Court found that "[t]he agreement directly affected and restrained" trade by narrowing the tile market.[19]

In *Loewe v. Lawlor*, the Court reversed a court which had sustained a demurrer to a complaint in which plaintiff hat manufacturers had brought an action against a union. The complaint alleged a boycott by the union against the manufacturers, their customers, and their product, in order to force plaintiffs to permit unionization of their factories.[20] The Court held that the combination was "aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes" and thus constituted a restraint of trade.[21]

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ence between the direct-indirect test discussed in *Hopkins* and applied in *Anderson*, and the rule-of-reason analysis "is . . . only that which obtains between things which do not differ at all."

Both *Hopkins* and *Anderson* were disposed of on interstate commerce grounds. *See* Swift & Co. v. United States, 196 U.S. 375, 397–98 (1905); Montague & Co. v. Lowry, 193 U.S. 38, 48 (1904). Yet cases decided after the pronouncement of the rule of reason cite them for the proposition that the restraint had been held to be reasonable. For example, in Board of Trade v. United States, 246 U.S. 231, 241 (1918), the Court upheld a challenged Board rule as reasonable and stated that "[t]he restraint imposed by the rule is less severe than that sustained in *Anderson v. United States*." These two early boycott cases have never been overruled, yet they must be regarded as anomalous, as they were decided before the rule of reason was articulated and their later citation appears to have been an attempt to harmonize their holdings with the new approach.

[16] 193 U.S. 38 (1904). For a discussion of this case see Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act*, 10 GEO. WASH. L. REV. 302, 306–07 (1942).

[17] 208 U.S. 274 (1908). For a discussion of this case see Kirkpatrick, *supra* note 16, at 307–08.

[18] 193 U.S. at 41–42, 44–45.

[19] *Id.* at 45, 48.

[20] 208 U.S. at 304–09.

[21] *Id.* at 294. This was the first case in which the Court held that labor unions were subject to the prohibitions of the antitrust laws. Apex Hosiery Co. v. Leader, 310 U.S. 469, 505 (1940). The questions surrounding the applicability of the antitrust laws to the activities of labor unions have been the subject of much controversy, legislative debate, and court interpretation. The Supreme Court's latest expression of the application of the antitrust laws to labor union activities is Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616 (1975), *noted in* 27 BAYLOR L. REV. 812 (1975); 44 FORDHAM L. REV. 191 (1975); 28 VAND. L. REV. 1337 (1975). For an excellent discussion and historical review

Neither of these holdings designated the restraint as a per se violation of section 1 of the Sherman Act. It must be noted, however, that both of these opinions were rendered before the "rule of reason" standard had gained the support of a majority of the Court.[22] Thus, at that time, there was no need to categorize a group boycott as a per se violation. Subsequent cases were decided after the rule of reason had become the accepted interpretation of section 1 of the Sherman Act. Therefore, an analysis of such decisions is more pertinent to the inquiry regarding the standard which the Court applied in these early boycott cases.

Eastern States Retail Lumber Dealers' Association v. United States[23] was the first case decided by the Court after the "rule of reason" interpretation had gained acceptance. In this case, it was charged that the defendants, associations of lumber retailers which had instituted an efficient and thorough system through which to obtain and circulate the names of wholesalers who were selling directly to consumers, had combined in violation of section 1 of the Sherman Act.[24] Although the Court determined that there was no explicit agreement not to deal with the offending wholesalers,[25] it stated that the dissemination of such a list "had and was intended to have the

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of the labor union antitrust exemption see Siegel, Connolly & Walker, *The Antitrust Exemption for Labor—Magna Carta or Carte Blanche?*, 13 DUQ. L. REV. 411 (1975). *See also* Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 729–42 (1962).

[22] *See* notes 2–5 *supra* and accompanying text.

[23] 234 U.S. 600 (1914). For a discussion of this case see Kirkpatrick, *supra* note 16, at 308–11.

[24] 234 U.S. at 605, 607–08. If a retailer discovered that a wholesaler was selling directly to a consumer, he would report the details to the secretary of the association who, in turn, would investigate the matter. *Id.* at 607. If the complaint by the retailer was found to be based in fact and the activities more than an isolated occurrence, the secretary would report to the association's board of directors, who would make the final determination as to whether or not the wholesaler's name would be listed. If the board decided that the wholesaler's name should be placed on the list, the name would be sent to New York, where it would be put on a list containing the name of each offending wholesaler. *Id.* This list would then be circulated among the secretaries of each association who would then distribute the list to each member. *Id.* at 607–08. It was possible for the wholesaler to have his name removed from the list if he adequately assured the local secretary that he was no longer selling directly to the consumers. The Court noted that "[t]hese lists were quite commonly spoken of as blacklists." *Id.* at 608.

[25] *Id.* at 608. By the very terms of section 1 of the Sherman Act, some sort of concerted action is necessary in order for a violation to occur. In *Eastern States*, the Court rejected the argument that there must be evidence of an actual agreement and noted "that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done." *Id.* at 612.

natural effect of causing such retailers to withhold their patronage from the concern listed."[26]

The Court, reciting the principles pertaining to the rule of reason[27] and briefly discussing prior boycott cases,[28] broadly stated that "[t]hese principles are applicable to this situation."[29] Holding that section 1 of the Sherman Act had been violated, the Court noted that the conduct of the defendants

> takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act and *puts it within the prohibited class of undue and unreasonable restraints* . . . .[30]

This language would not lead one to believe that the Court was declaring group boycotts per se invalid but, rather, was holding that the restraint effectuated through the defendants' combination was invalid

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[26] *Id.* at 609.

[27] *Id.* at 609–10. For a discussion of the rule of reason see notes 5–7 *supra* and accompanying text.

[28] *See* 234 U.S. at 610–11. In holding that the actions of the defendant retailers were illegal, the Court compared the combination in *Eastern States* to the one condemned in Loewe v. Lawlor, 208 U.S. 274 (1908) (discussed in text accompanying notes 20–21 *supra*) and noted that in both cases the scheme had caused third parties to boycott the objects of the attack even though such third parties had no personal grievance against them. 234 U.S. at 610–12.

The Court also quoted from its decision in Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 438 (1911), a boycott case in which no relief had been sought pursuant to the Sherman Act. In *Gompers*, the defendants had violated an injunction restraining them from boycotting the plaintiffs and from making or publishing any statements that the plaintiff was on any type of blacklist. Despite the injunction, the defendants had continued the boycott by publishing statements which would lead one to believe that plaintiff was on an " 'Unfair' list." *Id.* at 435–36. In answer to defendant's contention that a court cannot enjoin a boycott if it was effectuated through spoken or printed words, the Court noted that if that were correct, the same would be true under the Sherman Act. *Id.* at 438. In holding that the court did have the power to restrain not only the boycott but also the instrumentalities by which it was effectuated, the Court discussed its previous holding in *Loewe v. Lawlor* and stated:

> In that case the damages sued for were occasioned by acts which, among other things, did include the circulation of advertisements. But the principle announced by the court was general. It covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter.

Id.

[29] 234 U.S. at 611.

[30] *Id.* at 611–13 (emphasis added).

because it was found to be an unreasonable restraint of trade.[31] In any event, the language employed by the Court does not appear to announce a per se rule. Rather, the Court seems to be placing emphasis on the purpose and intent of the combination and the fact that there need be no explicit agreement or active coercion in order to find a combination in restraint of trade.[32]

Duplex Printing Press Co. v. Deering,[33] like the earlier *Loewe* case, involved an action by a manufacturer against a union. The manufacturer alleged that the union members had implemented a boycott against plaintiff's product by using threats and coercive measures in order to force the plaintiff to allow the unionization of his business and enforce a closed shop policy.[34] Noting that the activities of the defendant constituted "what is commonly known as a 'secondary boycott,' "[35] the Court stated that it had been settled by is prior de-

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[31] *See* Thomsen v. Cayser, 243 U.S. 66, 84–85 (1917), wherein the Court cited *Eastern States* as being a case in which the rule of reason was discussed.

Although the language employed by the Court in *Eastern States* does lead one to believe that it was resting its analysis upon the rule of reason, one commentator has expressed the feeling that "the relation of the rule of reason to boycott activities was not satisfactorily explained." Kirkpatrick, *supra* note 16, at 308–09 (footnote omitted).

[32] This same conclusion could be said to apply to the Court's decision in Lawlor v. Loewe, 235 U.S. 522 (1915), rendered almost seven months after its decision in *Eastern States*. *Lawlor v. Loewe* was a later development of *Loewe v. Lawlor*, *see* text accompanying notes 20–21 *supra*, in which the Court had previously overruled the sustaining of a demurrer. After remand, the plaintiffs had received a verdict in their favor which was affirmed by the Second Circuit. Lawlor v. Loewe, 209 F. 721, 723, 729 (2d Cir. 1913). On writ of error, the Court stated that its decision in *Eastern States* had

> establishe[d] that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States.

235 U.S. at 534. In affirming the judgment for the plaintiffs, the Court found that there was no question that defendants had intended to restrain the trade of the plaintiffs in order to force them to accede to their demands. It was therefore held "that a combination and conspiracy forbidden by the statute were proved." *Id.* at 534, 537.

[33] 254 U.S. 443 (1921), *noted in* 1 ST. JOHN'S L. REV. 189 (1927).

[34] 254 U.S. at 460–64.

[35] *Id.* at 466. The Court stated that a primary boycott was a combination in which the members simply did not deal with the object of the boycott or where customers of the object of the boycott were peacefully requested not to deal with him. *Id.* In contrast, the Court noted that a secondary boycott was

> a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain . . . , but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear or loss or damage to themselves should they deal with it.

cisions in *Loewe* and *Eastern States* "that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force."[36] Furthermore, the Court stated that even though the combination "may have [had] some object beneficial to [the unions] or their associates," there was no justification for their illegal acts.[37] Although this latter statement may be interpreted by some as propounding the essence of a per se illegal restraint, in view of the emphasis upon the coercive nature of the defendants' activities, it cannot be said that the language is free from ambiguity.[38]

Almost three years later the Supreme Court was again confronted with a case involving a group boycott. In *Binderup v. Pathe Exchange, Inc.*,[39] the plaintiff, an exhibitor of motion pictures, alleged that the defendants, who were in the business of manufacturing and distributing motion picture films, had combined in their refusal to sell to him in violation of the Sherman Act.[40] In determining whether the complaint stated a cause of action under the Act, the Court noted that it was alleged that the defendants controlled all of the film distribution business and could thereby force the plaintiff out of business if the combination were successful.[41] The Court found that these allegations evidenced a combination, "[t]he alleged purpose and direct effect" of which was to restrain trade by suppressing it altogether.[42] In *Binderup*, as in previous cases, the purpose and effect of the combination was emphasized. The Court did not avail itself of language implying that it was dealing with a restraint that was a per se violation of the Sherman Act. Rather, it described the conduct as being a "combination or conspiracy which *unreasonably* restrains" interstate commerce.[43]

At this point in the chronological development of the boycott cases it is useful to contrast the Court's treatment of price-fixing ac-

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Id. Accord, Bedford Cut Stone Co. v. Stone Cutters' Ass'n of North America, 274 U.S. 37, 50 (1927). *See generally* Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 202–09 (1936).

[36] 254 U.S. at 467–68.

[37] *Id.* at 468.

[38] The ambiguity is heightened by the Court's quotation from Lawlor v. Loewe, 235 U.S. 522 (1915), immediately prior to making this statement, in which it had emphasized that the intent and purpose of the combination were significant factors in determining its validity. *See* note 32 *supra*.

[39] 263 U.S. 291 (1923).

[40] *Id.* at 301–04.

[41] *Id.* at 309–11.

[42] *Id.* at 312.

[43] *Id.* at 311 (emphasis added).

tivities. In *United States v. Trenton Potteries Co.*[44] the defendants had been charged and convicted of price-fixing in violation of the Sherman Act.[45] The Second Circuit reversed the conviction on the ground that the trial court had improperly withdrawn the issue of the reasonableness of the restraint from the jury by charging them that if they found an agreement or combination, the restraint would be a violation of the Sherman Act as a matter of law.[46] On review, the Court addressed itself to the correctness of the charge to the jury.[47] The Court recited the familiar principle that only unreasonable restraints of trade are condemned by the Sherman Act but stated that simply because an agreement fixes reasonable prices it does not follow that the agreement is a reasonable restraint.[48] In holding the charge to the jury proper and reinstating the judgment of the trial court,[49] the Court stated that

> it has . . . often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, *despite the reasonableness of the particular prices agreed upon*.[50]

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[44] 273 U.S. 392 (1927). For a discussion of this case see 1 HANDLER, *supra* note 2, at 36–39; Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 CALIF. L. REV. 667, 711–14 (1940); 7 B.U.L. REV. 322 (1927).

[45] 273 U.S. at 393–94. The defendants had also been charged and convicted of a combination in restraint of trade in that they had "limit[ed] sales of pottery to a special group known . . . as 'legitimate jobbers.' " *Id.* at 394. This conviction was reversed by the court of appeals. Trenton Potteries Co. v. United States, 300 F. 550, 555 (2d Cir. 1924). On review, the substantive issues involved in this charge, which involved activities that could be considered a group boycott, were not discussed by the Supreme Court. *See* 273 U.S. at 401–02.

[46] Trenton Potteries Co. v. United States, 300 F. 550, 552–54 (2d Cir. 1924), *rev'd*, 273 U.S. 392 (1927).

[47] 273 U.S. at 396. The Court specifically framed the issue as "whether the trial judge correctly withdrew from the jury the consideration of the reasonableness of the particular restraints charged." *Id.*

[48] *Id.*

[49] *Id.* at 401, 407.

[50] *Id.* at 398 (emphasis added). In holding price-fixing agreements unreasonable as a matter of law, the Court expressed its reasoning as follows:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of

Throughout the opinion, the Court reiterated and emphasized that price-fixing agreements are unreasonable, in and of themselves, regardless of the reasonableness of the prices agreed upon.[51] Comparing these relatively forthright declarations concerning the validity of price-fixing agreements with the ambiguous statements employed in cases involving group boycotts, it would be difficult to conclude that the Court had as yet held group boycotts illegal as a matter of law.

In contrast to the clear per se tenor of *Trenton Potteries* was the Court's decision in *Bedford Stone Co. v. Stone Cutters' Association*,[52] a group boycott case decided less than two months later. The Court in *Bedford* again failed to delineate explicitly the applicable legal standard. The plaintiffs were corporations engaged in the limestone quarrying and fabricating business. The defendant union, whose members were engaged in various areas of the stone-cutting trade, had directed its members not to handle any stone, in any capacity, which had been worked on by nonmembers. This directive resulted in labor strikes against purchasers of such stone. This policy was enforced against plaintiffs' product because they employed members of unaffiliated unions.[53] The Court found the situation strikingly similar to that in *Duplex*[54] and stated that the decison in *Duplex* "might serve as an opinion in this case."[55] After reviewing the facts and holdings in *Duplex* and other section 1 cases involving labor boycotts,[56]

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minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

Id. at 397–98.

[51] *See id.* at 397–401.

[52] 274 U.S. 37 (1927). For a discussion of this case see Comment, *The Stonecutters' Case—Strikes on "Unfair" Material Entering Interstate Commerce*, 37 YALE L.J. 84 (1927); 14 VA. L. REV. 112 (1927); 4 WIS. L. REV. 250 (1927).

[53] 274 U.S. at 41–46.

[54] For a discussion of *Duplex* see notes 33–38 *supra* and accompanying text.

[55] 274 U.S. at 49.

[56] *Id.* at 49–53. In addition to *Duplex*, the Court reviewed its previous decisions in United States v. Brims, 272 U.S. 549 (1926), Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (discussed in note 28 *supra*), and Loewe v. Lawlor, 208 U.S. 274 (1908) (discussed in text accompanying notes 20–21 *supra*). In *Brims*, millwork manufacturers, building contractors, and union carpenters who were employed by the manufacturers and contractors, were charged with and found guilty of combining in order to eliminate competition from out-of-state, non-union-made materials. 272 U.S. at 551–52. The manufacturers and contractors had agreed to hire only union members and the union members had agreed to work only on union-made materials, thereby causing the trade in out-of-state, non-union mills to be restrained. *Id.* at 552. The appellate court had reversed the conviction on the ground that the proof failed to support the indictment. *Id.* at 551. The Supreme Court stated that the proofs established at the trial could have led

the Court stated that even though the defendants may have a "general right to combine" in order to protect themselves, in this case the combination purposefully and directly interfered, or threatened to interfere, with the interstate limestone production trade. It was then held that this was "a combination in undue and unreasonable restraint" of trade.[57]

Although the Court rejected the argument that the boycott was "a necessary defensive measure," it still employed language which implied that the holding was based upon the finding that the restraint was unreasonable.[58] In light of the relatively clear holding in *Trenton Potteries* concerning the nature of a price-fixing agreement, it would be impossible to state definitively that this cryptic language was evidence of a holding that group boycotts were per se violations of section 1 of the Sherman Act.[59]

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the jury to the inference "that, as *intended* by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded." *Id.* at 552 (emphasis added). Since this was clearly within the scope of the Sherman Act and the indictment, the decision of the court of appeals was reversed. *See id.* at 553.

[57] 274 U.S. at 54.

[58] *Id.*

[59] In Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), the Court claimed that although *Bedford* and *Duplex* were decided after the rule of reason was recognized,

> [t]he applicability of that rule to restraints upon commerce affected by a labor union in order to promote and consolidate the interests of its union was not considered.

Id. at 507 (footnote omitted). Stating that it would not consider the applicability of the rule in the case presently under review, the Court mentioned National Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403 (1923), as an example of a similar case in which the restraint on commerce was held to be reasonable under the rule. 310 U.S. at 507 & n.25. In the *Window Glass* case, all manufacturers of handblown window glass had entered into an agreement with the union representing all of the available laborers. 263 U.S. at 411. The effect of the agreement caused production in each factory to be stopped for one of two five-month working periods. *Id.* This was deemed necessary by the parties because the industry was dwindling due to competition from automated factories which controlled the window glass market, and trained labor was too scarce to fully staff the factories on a year-round basis. The purpose of the agreement was to insure the continuous employment of workers and the efficient use of the factories. *Id.* at 411–13. The lower court enjoined the agreement under the Sherman Act. *Id.* at 411. The Supreme Court, however, pointed out that the agreement would reduce the manufacturers' overhead and provide work for the laborers during both seasons. *Id.* at 413. Deeming further explanation unnecessary, the Court reversed, stating: "It is enough that we see no combination in unreasonable restraint of trade in the arrangements made to meet the short supply of men." *Id.* Although it may appear that the Court was holding that this restraint, which seems to be in the nature of a boycott, was reasonable, a contrary view has been expressed. *See* Kirkpatrick, *supra* note 16, at 317 n.32. For an explanation of the decision as a product of the time period in which it was decided see 1 HANDLER, *supra* note 2, at 59–61.

Another example of the Court's equivocal position regarding the standard to be applied in determining the validity of concerted refusals to deal is *Paramount Famous Lasky Corp. v. United States*.[60] In that case, the defendants, producers and distributors of motion picture films who controlled 60% of the national market, were charged with restraining trade by refusing to deal with exhibitors who failed to comply with the arbitration clause in a standard form contract used by all of the defendants.[61] The United States contended that the tendency of the arrangement was "to produce [a] material and *unreasonable* restraint" of trade.[62] The trial court "accepted this view" and the Supreme Court affirmed.[63] In rejecting defendants' argument that the contract and the arbitration clause were reasonable, the Court held that although arbitration may be "well adapted" to industry needs, "when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal."[64]

Again, it is useful to compare the Court's statements regarding price-fixing agreements. If the Supreme Court did not make its posi-

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[60] 282 U.S. 30 (1930). For a discussion of this case see 5 U. CIN. L. REV. 96 (1931); 40 YALE L.J. 640 (1931).

[61] 282 U.S. at 36–41.

[62] *Id.* at 41 (emphasis added).

[63] *Id.* at 41–42.

[64] *Id.* at 42–43. In United States v. First Nat'l Pictures, Inc., 282 U.S. 44, 49 (1930), the Court was presented with another challenge to the activities of these defendants. The distributors and 32 Film Boards of Trade, both controlling 98% of the business, established credit committees to control and regulate the completion and assumption of outstanding contracts when theatres were transferred to new owners. *Id.* at 49, 54. If the new owner did not agree to assume the preexisting contracts, he would have to pay a cash security, the amount of said security being determined by the committee, in order to enter into a future contract. *Id.* at 50. If he refused to do this, no member would be permitted to deal with him. *Id.* Referring to its earlier decisions in *Paramount Famous Lasky*, *Eastern States*, and *Binderup*, the Court cursorily held that those cases would "suffice . . . to show the challenged arrangement conflicts with the Sherman Act." 282 U.S. at 54–55. For a discussion of *First National* see 29 MICH. L. REV. 909, 914–15 (1931).

The *First National* Court also cited Anderson v. Shipowners Ass'n, 272 U.S. 359, 360–61 (1926), in which the members of various associations who controlled a substantial number of merchant vessels were alleged to have engaged in activities violative of section 1 of the Sherman Act. The defendants, who controlled and regulated the employment and wages of the seamen, refused to hire them except on the terms and conditions established by the associations. *Id.* at 361–62. The Court condemned the actions of the defendants in surrendering all control to the associations and stated that the absence of an allegation of specific intent to restrain trade was unimportant in view of the consequences of the combination. *Id.* at 362–63. One commentator has noted that the Court never discussed the reasonableness of the restraint. *See* Kirkpatrick, *supra* note 16, at 312–13.

tion clear with regard to the validity of price-fixing agreements in *Trenton Potteries*, its decision in *United States v. Socony-Vacuum Oil Co.*[65] laid all remaining doubts to rest.[66] The Court unequivocally stated that for over a period of forty years there had been no deviation from the rule that price-fixing agreements were per se illegal and that the Court would reject any defense establishing that the agreements operated to alleviate "competitive abuses or evils."[67]

Not quite one year after its emphatic statement regarding price-fixing agreements, the Court again dealt with a group boycott in *Fashion Originators' Guild of America, Inc. v. FTC.*[68] Defendants were manufacturers of women's garments and manufacturers of the textiles used to make the garments. These manufacturers, who controlled a significant portion of the market, combined in an attempt to put an end to the practice of competing manufacturers of copying the designs and then selling the clothing at less expensive prices.[69] In order to prevent this " 'style piracy,' " the defendants refused to deal with retailers who sold copies and with manufacturers who used copied textiles or sold to non-cooperating retailers.[70] In addition, retailers were induced to sign cooperation agreements, sometimes under threat that the members of the Guild would refuse to deal with them.[71] The Federal Trade Commission found these practices to be an unfair method of competition in violation of the Federal Trade

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[65] 310 U.S. 150 (1940). For a discussion of this case see Peppin, *supra* note 44, at 665–70, 722–32; Note, *Price Fixing Agreements and the Sherman Act*, 16 IND. L.J. 421 (1941); 14 TEMPLE L.Q. 541 (1940); 89 U. PA. L. REV. 683 (1941); 27 VA. L. REV. 123 (1940).

[66] 310 U.S. at 210–18.

[67] *Id.* at 218. In stating that for over forty years it had adhered to the position that price-fixing agreements are per se illegal, the Court was apparently alluding to its decisions in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), and United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898). For a discussion of these cases see notes 2–4 *supra* and accompanying text.

[68] 312 U.S. 457 (1941). For a discussion of this case see 29 CALIF. L. REV. 258 (1941); 41 COLUM. L. REV. 941 (1941); 39 MICH. L. REV. 1249 (1941); 89 U. PA. L. REV. 987 (1941).

[69] 312 U.S. at 461–62. The Court stated that the garment manufacturers sold such a great number of differently priced women's garments that "competition and the demand of the consuming public ma[de] it necessary for most retail dealers to stock some of the products of these manufacturers." *Id.* at 462. It was further noted that the strength of this combination was heightened because of the affiliation of the textile manufacturers. *Id.* at 461–62.

[70] *Id.* at 461–62, 464.

[71] *Id.* at 461–62. The Guild established an elaborate and thorough system through which to enforce its rules. *Id.* at 462–63.

Commission Act.[72] In affirming this finding, the Court found that the defendants' conduct also violated the policies of the Sherman Act.[73]

The defendants had contended that the boycott was reasonable as a necessary measure to combat the evils of " 'style piracy.' "[74] The Commission had refused to hear most of the evidence that the defendants had wished to present pertaining to their defense that their actions were reasonable.[75] The Court, in upholding the Commission, noted that the power of the combination, its monopolistic tendencies, the coercion exercised, and "the intentional destruction of one type of manufacture and sale which competed with Guild members" caused the combination to be brought within the prohibitions of the antitrust laws.[76] The Court then held that "[*u*]*nder these circumstances* it was not error to refuse to hear the evidence offered."[77] The reasonableness of the measures utilized by the Guild to attain its objective was considered no more relevant than "the reasonableness of the prices fixed by unlawful combination."[78]

This language was the closest that the Court had come to declaring explicitly that group boycotts were per se violations of section 1 of the Sherman Act. In fact, it has appeared to some that the Court was making such a pronouncement.[79] Yet, the Court prefaced its holding

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[72] *Id.* at 460. Under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), *as amended*, (Supp. IV, 1975), the Federal Trade Commission has the power to bring an action challenging practices which are "[u]nfair methods of competition," "unfair or deceptive acts or practices," or any activities that would violate the letter or spirit of the antitrust laws. The power of the Commission pursuant to the Act is broad and allows it to challenge prohibited conduct in its incipiency. Furthermore, "unfair competitive practices [are] not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws." Similarly, these practices are not "confined to purely competitive behavior." FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

[73] 312 U.S. at 464–65.

[74] *Id.* at 467.

[75] *Id.*

[76] *Id.* at 467–68.

[77] *Id.* at 468 (emphasis added).

[78] *Id.* Decided on the same day as *Fashion Originators'* was Millinery Creator's Guild v. FTC, 312 U.S. 469 (1941). The defendant in this case was a guild composed of manufacturers and designers of women's hats. *Id.* at 472. The conduct challenged and the issues presented were virtually identical to those in *Fashion Originators'*. *Id.* at 471. On the authority of its decision in *Fashion Originators'* and without significant discussion, the Court affirmed the Commission's finding that the defendant's practices were an unfair method of competition. *Id.* at 472. For a discussion of *Fashion Originators'* and *Millinery Creator's* see Kirkpatrick, *supra* note 16, at 317–22.

[79] *See* Comment, *supra* note 1, at 135–36; Note, *The Right to Refuse to Deal*, 12 W. RES. L. REV. 759, 763 (1961); 41 COLUM. L. REV. 941, 942 (1941).

by stating: "Under these circumstances." The circumstances in *Fashion Originators'* were clear cut and well defined. The defendants admitted that they had purposely agreed to a boycott in order to destroy the competition engendered by the " 'style piracy' " tactics of their competitors.[80] The defendants comprised a bi-level horizontal combination of manufacturers and designers of the textiles and manufacturers and designers of the garments, both of whom had significant economic power. Although the defendants protested that their actions benefited the consuming public by protecting them from cheap imitations,[81] the practical result was that consumers were being deprived of less expensive copies of the more exclusive designs.

The enigmatic position taken by the Court[82] was not clarified by its decision four years later in *Associated Press v. United States.*[83] The Court sustained the Government's challenge of certain by-laws of the Associated Press "which granted each member powers to block its non-member competitors from membership."[84] The trial court had analyzed the arrangement in terms of the rule of reason and found it to be an unreasonable restraint of trade.[85] In affirming the decree of the trial court, the Supreme Court appeared to stress the size of Associated Press, noting that such an exclusive arrangement between a reporter and a single newspaper or "between two newspapers in dif-

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[80] 312 U.S. at 461.

[81] *Id.* at 461–62, 467.

[82] It has been noted that "[i]nstead of being a landmark case against justification for boycotts, *Fashion Originators'* was followed by two decades of confusion." Comment, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act*, 30 U. CHI. L. REV. 171, 173 (1962). However, in International Salt Co. v. United States, 332 U.S. 392, 396 (1947), in which a tying arrangement was challenged, the Court did not appear to be confused when it cited *Fashion Originators'* for the proposition that "it is unreasonable, *per se*, to foreclose competitors from any substantial market."

[83] 326 U.S. 1 (1945). For a discussion of *Associated Press* see Ellis, *Paradoxes of the Associated Press Decision—a Reply*, 13 U. CHI. L. REV. 471 (1946); Lewin, *The Associated Press Decision—an Extension of the Sherman Act?*, 13 U. CHI. L. REV. 247 (1946); Note, *The Sherman Act and News Gathering Agencies*, 14 GEO. WASH. L. REV. 461 (1946); 21 IND. L.J. 221 (1946); 44 MICH. L. REV. 677 (1946); 31 VA. L. REV. 954 (1945).

[84] 326 U.S. at 4. Members of Associated Press, which was a cooperative association composed of publishers of over 1,200 newspapers, had to agree to adhere to the by-laws. Failure to do so could have resulted in a member being expelled, suspended, or fined. *Id.* at 3–4, 8. If an applicant did not compete with a member, it was relatively simple to gain admission. *Id.* at 9. But if the applicant did compete, it was either impossible, or the terms of admission were so burdensome as to make it impossible, to become a member. *Id.* at 10–11 & n.5.

[85] United States v. Associated Press, 52 F. Supp. 362, 368–75 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

ferent cities" might be reasonable.[86] The Court, although never expressly discussing the arrangement as a group boycott, nevertheless relied upon its prior decisions involving group boycotts and stated that the restraint under review was no less a violation of the Sherman Act than those arrangements challenged in prior cases where a violation was found to exist due to restrictions on trade outlets. It was thus held "that arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose."[87]

The ambiguity of the majority opinion is exemplified by the concurring and dissenting opinions. The concurring opinions of Justice Douglas and Justice Frankfurter expressly analyzed the restraint in terms of the rule of reason,[88] and the dissenting opinion of Justice Roberts viewed the majority opinion as a return to the literal approach taken by the Court in its early decisions interpreting the Sherman Act.[89] Thus, after the *Associated Press* decision, it could not definitely be concluded that group boycotts were per se violations of section 1 of the Sherman Act, especially in light of the explicit language utilized in the price-fixing cases.[90]

At this point in the development of the case law, it is not difficult to understand why the majority of lower federal courts had not clearly explicated the rationale under which the challenged restraint was being reviewed.[91] Although the Supreme Court had been relatively consistent in its condemnation of combinations which had used

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[86] 326 U.S. at 13–14, 18, 23.

[87] *Id.* at 18–19.

[88] *Id.* at 23 (Douglas, J., concurring); *id.* at 27 (Frankfurter, J., concurring).

[89] *Id.* at 37–38 (Roberts, J., dissenting).

[90] *See* Ellis, *supra* note 83, at 473; Lewin, *supra* note 83, at 248, 260–62; Comment, *Refusals to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1137–40 (1949); 51 NW. U.L. REV. 628, 636–37 (1956). It is interesting to note that in United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 296, 298 (1945), the Court specifically stated that price-fixing agreements were per se violations, but it did not make a similar statement in regard to group boycotts.

[91] For examples of the reluctance of the lower courts to rely upon either a per se or rule-of-reason analysis see, *e.g.*, Wholesale Dry Goods Inst., Inc. v. FTC, 139 F.2d 230, 230–31 (2d Cir. 1943), *cert. denied*, 321 U.S. 770 (1944); Pacific States Paper Trade Ass'n v. FTC, 4 F.2d 457, 462–63 (9th Cir. 1925), *aff'd in part and rev'd in part on other grounds*, 273 U.S. 52 (1927); Wholesale Grocers' Ass'n v. FTC, 277 F. 657, 663–64 (5th Cir. 1922); National Harness Mfrs. Ass'n v. FTC, 268 F. 705, 709–12 (6th Cir. 1920); Belfi v. United States, 259 F. 822, 826–27 (3d Cir. 1919); Knauer v. United States, 237 F. 8, 14, 19–20 (8th Cir. 1916); Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176, 181–82 (E.D. Tenn. 1940), *aff'd per curiam*, 123 F.2d 1016 (6th Cir. 1941). *But see* Butterick Publishing Co. v. FTC, 85 F.2d 522, 525–26 (2d Cir. 1936) (rule of reason utilized); United States v. Waltham Watch Co., 47 F. Supp. 524, 531–32 (S.D.N.Y. 1942) (per se approach employed).

their economic strength in order to implement a refusal to deal, it had never categorically held that concerted refusals to deal were per se unreasonable. The boycott arrangements condemned by the Court were horizontal combinations, possessed of enough economic power to make their actions effective, and which had as their purpose or effect a result which was considered to be a restraint of trade prohibited by the Sherman Act.

THE SUPREME COURT POSITION AFTER 1948

Then, in 1948, the Court chose to deliver what was apparently its first unambiguous statement regarding its position concerning the validity of group boycotts. In *United States v. Columbia Steel Co.*,[92] the Court noted that an otherwise reasonable restraint may become unreasonable when it "is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*."[93] The Court then proceeded to give examples of per se illegal restraints, and, in dictum, announced that the amount of commerce affected is irrelevant when the defendants have been charged with having "concertedly refused to deal with non-members of an association . . . because such restraints are illegal *per se*."[94] In making this pronouncement, the Court relied on prior decisions involving trade associations which, through some device, had caused their members not to deal with nonmembers or with others who dealt with nonmembers.[95]

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[92] 334 U.S. 495 (1948). The Government had brought suit in order to prevent the assets of Consolidated Steel Corporation from being purchased by United States Steel Corporation and its subsidiaries. *Id.* at 498. It was contended by the United States that the acquisition would result in a restraint of trade in violation of section 1 of the Sherman Act. Furthermore, it was alleged that the purchase itself was an attempt to monopolize in violation of section 2 of the Sherman Act. *Id.* at 498–99. The Court rejected both charges. *Id.* at 508. The Court specifically rejected the Government's argument that if "an 'appreciable' amount of interstate commerce is involved," *id.* at 521 (footnote omitted), a vertical integration which resulted in a controlled market for a manufacturer's goods would be illegal per se, *id.* at 519.

[93] *Id.* at 522. In explaining the relevance of intent in determining whether there has been a violation of the Sherman Act, the Court stated:

> When a combination through its actual operation results in an unreasonable restraint, intent or purpose may be inferred; even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act.

Id. at 525. *See* United States v. Griffith, 334 U.S. 100, 105–06 (1948).

[94] 334 U.S. at 522–23 (footnote omitted).

[95] *Id.* at 522 n.21. The Court cited Associated Press v. United States, 326 U.S. 1 (1945); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); Eastern

The Court's pronouncement in *Columbia Steel* is surprising for a number of reasons.[96] First, the cases which the Court cited as authority did not explicitly hold that even this particular form of a group boycott, implemented by trade associations, was illegal per se. Furthermore, the Court does not generally favor declaring a restraint illegal per se without a more extensive experience with and analysis of the effects of the particular restraint on the market.[97] Finally, such a pronouncement was not necessary, because the issues in *Columbia Steel* did not include a concerted refusal to deal.[98] On the other hand, it might be argued that the Court had over an extended period of time consistently condemned concerted refusals to deal implemented by trade associations. Viewed in such a light, this pronouncement was not a radical departure from the way in which the Court had treated group boycotts in the past.

The Court in *Times-Picayune Publishing Co. v. United States* reiterated its condemnation of group boycotts.[99] The Court stated, without qualification, and again in dictum, that "group boycotts, or

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States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); and Montague & Co. v. Lowry, 193 U.S. 38 (1904).

[96] The Court had previously suggested that it considered group boycotts to be per se unreasonable in International Salt Co. v. United States, 332 U.S. 392 (1947). In *International Salt*, lessees of certain patented machinery were required to use the lessor's unpatented product as a condition to obtaining the needed machine. The Government challenged this agreement as an illegal tying arrangement. *Id.* at 393. In holding the tying arrangement per se illegal, the Court, citing *Fashion Originators'*, stated that "it is unreasonable, *per se*, to foreclose competitors from any substantial market." *Id.* at 396. Although this statement could be interpreted to mean that boycotts were to be considered per se unreasonable, the statement is not overly clear in light of the fact that the Court employed the phrase in its discussion of the monopolistic tendencies of the challenged contracts. *See id. Accord*, United States v. Griffith, 334 U.S. 100, 105–07 (1948).

[97] *See, e.g.*, United States v. Topco Associates, Inc., 405 U.S. 596, 607–08 (1972); White Motor Co. v. United States, 372 U.S. 253, 261 (1963).

[98] *See* note 92 *supra*.

[99] 345 U.S. 594 (1953). In *Times-Picayune*, the Government challenged, as violative of sections 1 and 2 of the Sherman Act, the publishing company's practice of requiring buyers of advertising space, both classified and general display, to purchase space in both its morning and evening newspapers. *Id.* at 596–97. The trial court had found that this arrangement was an illegal tying arrangement under section 1 and that section 2 had been violated in that the defendant had attempted to monopolize the New Orleans newspaper market. United States v. Times-Picayune Publishing Co., 105 F. Supp. 670, 677–81 (E.D. La. 1952). The Supreme Court reversed, stating that the challenged tying arrangement did not fall within the definition of those tying arrangements held illegal per se. 345 U.S. at 608–14, 628. The Court then viewed the restraint under the rule of reason and found that the arrangement did not have an unlawful purpose or effect. *Id.* at 614–24. It was also determined that the Government had failed to establish that defendant had specifically intended to monopolize. As this is a necessary element of an attempt to monopolize, the Court reversed the trial court's finding of a section 2 violation. *Id.* at 626.

concerted refusals to deal, clearly run afoul of § 1."[100] This statement appears to encompass a wider range of activities than did the dictum in *Columbia Steel*, as it contains no language which would operate to limit its application to members of associations refusing to deal with nonmembers. Yet again, as in the past, the Court was not being overly clear. Did the Court intend the "clearly run afoul" language to be synonymous with illegal per se? This question appears to be more germane when it is considered that the arrangement challenged in *Times-Picayune* was not a group boycott. Thus, if "clearly run afoul" is the equivalent of illegal per se, the Court was making, in dictum, the sweeping holding, which would have numerous repercussions, that all group boycotts are illegal per se.

The cases cited by the Court as authority for this proposition make the statement all the more peculiar. The Court cited *Associated Press*, a case in which the restraint had not really been discussed in terms of a concerted refusal to deal.[101] It also made reference to *Columbia Steel*, where the discussion relative to group boycotts was dictum.[102] The Court further cited *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[103] where an agreement to fix maximum resale prices was held to be a per se violation of section 1 of the Sherman Act.[104] Thus, the decisions in both *Columbia Steel* and *Times-Pica-*

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[100] 345 U.S. at 625.

[101] For a discussion of *Associated Press* see notes 83–90 *supra* and accompanying text.

[102] 345 U.S. at 625. For a discussion of *Columbia Steel* see notes 92–95 *supra* and accompanying text.

[103] 340 U.S. 211 (1951).

[104] *Id.* at 213. Although *Kiefer-Stewart* has been cited as support for the proposition that group boycotts are per se illegal, the holding of the case appears to have been primarily based on the finding of an illegal price-fixing arrangement. The plaintiff brought an action alleging that the defendants had conspired to fix resale prices. At trial, it was shown that the defendants had fixed maximum resale prices, and a verdict was rendered for the plaintiff. The circuit court of appeals reversed this verdict, holding that an agreement to fix maximum resale prices was not a Sherman Act violation. *Id.* at 212. The Supreme Court, reversing the court of appeals, held that an agreement to fix maximum prices, no less than an agreement to fix minimum prices, was illegal per se. *Id.* at 213–15. The defendants then argued that the trial court had erred in charging the jury that even if the defendants could prove that plaintiff had taken part in a combination of wholesalers, the purpose of which was to fix minimum prices, it would not be a defense to the present suit. *Id.* at 214. The Court held this instruction to be proper and stated that the defendants, acting independently, could have possibly refused to deal with the plaintiff. It was in this context that the Supreme Court stated: "[T]he Sherman Act makes it an offense for [defendants] to agree among themselves to stop selling to particular customers." *Id.* The Court then explained that the defendants may have a separate cause of action, but that the alleged illegal acts of the plaintiff were not a defense to the defendants' unlawful combination. *Id.* For a discussion of alleged illegal conduct

yune were based upon cases which did not primarily concern a concerted refusal to deal, or where the opinion either had not elucidated the Court's position on group boycotts or had not held that concerted refusals to deal were per se illegal.[105]

In 1958, the Court rendered its decision in *Northern Pacific Railway Co. v. United States*,[106] a case involving a tying arrangement, and for the third time declared, in dictum, that group boycotts were "unlawful in and of themselves."[107] It is interesting to note that the Court also broadly stated that tying arrangements were illegal per se.[108] Yet, even the holding that tying arrangements were per se violations of section 1 of the Sherman Act was limited to situations in which

> a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected.[109]

Thus, even though the Court broadly stated that tying arrangements are unlawful in and of themselves, the actual rule of law requires that certain conditions be met before a per se violation is found.[110] It would seem then that at this time, it could have been argued by analogy that, even if group boycotts were per se illegal, the restraint would be more aptly classified as a quasi-per se illegal restraint of trade.[111] In any event, it could not be said that, at the time of the

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as a defense see Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 264–66. *See also* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 140 (1968) (common law doctrine of *in pari delicto* not a defense to an antitrust action).

[105] *See* 71 HARV. L. REV. 1531, 1535 (1958); 70 HARV. L. REV. 1113, 1114 (1957); 51 NW. U.L. REV. 628, 630–32 (1956).

[106] 356 U.S. 1 (1958). In *Northern Pacific*, the Court sustained the Government's challenge of the defendant's preferential routing agreements. The agreements were found to be unlawful tying arrangements, per se violative of section 1 of the Sherman Act. *Id.* at 3–4, 8.

[107] *Id.* at 5. The Court cited *Fashion Originators'* as authority for this statement. For a discussion of *Fashion Originators'* see notes 68–81 *supra* and accompanying text.

[108] 356 U.S. at 5. For a discussion of tying arrangements see note 11 *supra*.

[109] 356 U.S. at 6.

[110] The Court specifically stated that the preconditions do not require " 'monopoly power' or 'dominance' over the tying product" but rather require "anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product," where "a 'not insubstantial' amount of interstate commerce is affected." *Id.* at 11.

[111] *See* Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165, 1169–70 (1959), where the author points out

Northern Pacific decision, the Court had held that all group boycotts, under all circumstances, regardless of the purpose and effect or the economic strength of the combination, were per se unreasonable. Thus, a number of lower federal courts, disregarding the dicta of the Supreme Court, continued to employ the rule of reason.[112]

Klor's, Inc. v. Broadway-Hale Stores, Inc.,[113] was the next significant case treating concerted refusals to deal. The apparent result

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the inconsistent language used by the court in *Northern Pacific* in describing the legal standard to be applied to tying arrangements.

It could be postulated, analogous to a tying arrangement, that a precondition to a holding that a group boycott was per se illegal was a finding that the combination possessed sufficient economic power. Such a hypothesis could be supported by the Court's own discussion in *Associated Press* that a single reporter and a newspaper or two newspapers in different cities may agree to an exclusive arrangement which may be found to be a reasonable restraint of trade and therefore not a violation of the antitrust laws, 326 U.S. at 14, for technically this could be considered an agreement not to deal and therefore unreasonable in and of itself. Support for such a proposition is also found in the Court's consistent emphasis in boycott cases on the economic power of the combination. *See* 71 HARV. L. REV. 1531, 1541 (1958).

[112] A significant number of courts either took note of the per se dicta employed by the Supreme Court but determined that it did not apply to the situation before it, or simply avoided the issue by applying the rule of reason. *See, e.g.*, Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420–21 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957) (rule of reason applied); Union Circulation Co. v. FTC, 241 F.2d 652, 656–57 (2d Cir. 1957) (per se dicta not followed); Paramount Film Distrib. Corp. v. Village Theatre Inc., 228 F.2d 721, 725–26 (10th Cir. 1955) (rule of reason applied); Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co., 195 F.2d 86, 88–89 (7th Cir.), *cert. denied*, 344 U.S. 816 (1952) (rule of reason applied); United States v. New Orleans Ins. Exch., 148 F. Supp. 915, 918–21 (E.D. La.), *aff'd per curiam*, 355 U.S. 22 (1957) (rule of reason applied); United States v. Insurance Bd., 144 F. Supp. 684, 696–98 (N.D. Ohio 1956) (per se dicta not followed); Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286, 299–301 & nn.12 & 13 (S.D.N.Y. 1954), *aff'd*, 225 F.2d 289 (2d Cir. 1955) (per se dicta not followed). *See generally* 1 HANDLER, *supra* note 2, at 252–56; Handler, *Recent Developments in Antitrust Law: 1958–1959*, 59 COLUM. L. REV. 843, 862 (1959); Rahl, *supra* note 111, at 1168–69; 25 FORDHAM L. REV. 732 (1957); 70 HARV. L. REV. 1113 (1957); 55 MICH. L. REV. 1035 (1957); 51 NW. U.L. REV. 628 (1956). But in other cases it appears that group boycotts have been considered per se unreasonable. *See, e.g.*, American Fed'n of Tobacco Growers v. Neal, 183 F.2d 869, 872–73 (4th Cir. 1950); United States v. New York Great Atl. & Pac. Tea Co., 173 F.2d 79, 87–88 (7th Cir. 1949); Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F. Supp. 274, 285–86 (D. Mont. 1958); Evening News Publishing Co. v. Allied Newspaper Carriers, 160 F. Supp. 568, 577 (D.N.J. 1958), *aff'd*, 263 F.2d 715 (3d Cir.), *cert. denied*, 360 U.S. 929 (1959); United States v. Nationwide Trailer Rental Sys., Inc., 156 F. Supp. 800, 805 (D. Kan.), *aff'd per curiam*, 355 U.S. 10 (1957); United States v. Minneapolis Elec. Contractors Ass'n, 99 F. Supp. 75, 79 (D. Minn. 1951).

[113] 359 U.S. 207 (1959). For a discussion of this case see Handler, *supra* note 112, at 862–66; Oppenheim, *Selected Antitrust Developments in the Courts and Federal Trade Commission During Past Year*, 15 A.B.A. ANTITRUST L.J. 37, 37–42, 54–56 (1959); Rahl, *supra* note 111; 47 CALIF. L. REV. 383 (1959); 57 MICH. L. REV. 1244 (1959); 44 MINN. L. REV. 568 (1960); 11 SYRACUSE L. REV. 88 (1959); 7 U.C.L.A.L. REV. 121 (1959); 1959 U. ILL. L.F. 1090.

of the Court's decision was to allay all questions concerning its position on the legality of concerted refusals to deal. Klor's, an independent retailer of household appliances, brought an action against Broadway-Hale Stores, a chain department store which operated a store adjacent to Klor's, alleging "that Broadway-Hale and 10 national manufacturers and their distributors . . . ha[d] conspired" in violation of the Sherman Act.[114] Specifically, it was claimed that Broadway-Hale "ha[d] used its 'monopolistic' buying power" to cause the manufacturers and distributors to refrain from dealing with Klor's or to deal with it only on disadvantageous terms or at discriminatory prices.[115] Rather than denying these allegations, the defendants sought summary judgment based on the fact that there were many other retailers in the area who sold many different brands of household appliances, including the brands which Klor's was unable to obtain.[116] The district court dismissed the complaint[117] and the court of appeals affirmed.[118] Both decisions were based on the theory that, to find a violation of the Sherman Act, there must be a showing of a public injury, which was found lacking in this situation.[119] Furthermore, the court of appeals implied that not all boycotts are per se unreasonable.[120]

In reversing the decision of the circuit court, the Supreme Court construed the interpretation of the court of appeals to mean that a combination "of powerful businessmen may . . . deprive a single merchant . . . of the goods he needs to compete effectively" as long as public opportunities to deal in a competitive market are not lessened.[121] The Court then stated that, in its opinion, the complaint alleged a "type of trade restraint and public harm the Sherman Act forbids."[122] In reaching this conclusion, the Court reviewed the dis-

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[114] 359 U.S. at 208.

[115] *Id.* at 209.

[116] *Id.* at 209–10.

[117] Klor's, Inc. v. Broadway-Hale Stores, Inc., 1956 Trade Cas. ¶ 68,495, at 72,048 (N.D. Cal.), *aff'd*, 255 F.2d 214 (9th Cir. 1958), *rev'd*, 359 U.S. 207 (1959).

[118] Klor's, Inc. v. Broadway-Hale Stores, Inc., 255 F.2d 214, 235 (9th Cir. 1958), *rev'd*, 359 U.S. 207 (1959). For a discussion of the circuit court decision see 1 HANDLER, *supra* note 2, at 278–85; Comment, *Proving Injury to Competition in Private Antitrust Suits Provoked by Concerted Refusals To Deal*, 68 YALE L.J. 949 (1959); 27 GEO. WASH. L. REV. 378 (1958); 11 STAN. L. REV. 338 (1959).

[119] Klor's, Inc. v. Broadway-Hale Stores, Inc., 1956 Trade Cas. ¶ 68,495, at 72,048 (N.D. Cal.), *aff'd*, 255 F.2d 214, 235 (9th Cir. 1958), *rev'd*, 359 U.S. 207 (1959). For a discussion of "public injury" see note 125 *infra*.

[120] Klor's, Inc. v. Broadway-Hale Stores, Inc., 255 F.2d 214, 231–35 (9th Cir. 1958), *rev'd*, 359 U.S. 207 (1959).

[121] 359 U.S. at 210.

[122] *Id.*

tinction drawn between those restraints whose legality was dependent upon the attendant circumstances[123] and those "restraints which from their 'nature or character' were unduly restrictive, and hence forbidden by both the common law and the statute."[124] The Court, noting that in this latter category of restraints the question of public injury is not a relevant consideration,[125] held that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."[126] The Court stated that group boycotts had not been saved by the fact that they did not have an

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[123] *Id.* at 211. The Court specifically referred to its prior decision in Standard Oil Co. v. United States, 221 U.S. 1 (1911), wherein the rule of reason was first enunciated. For a discussion of *Standard Oil* see note 5 *supra*.

[124] 359 U.S. at 211. One commentator claimed that the language used by the Court in distinguishing between the rule of reason and the per se analysis reaffirms the dual classification of restraints of trade. Yet he fears that the members of the *Klor's* Court were not disposed to indulge in the rule-of-reason analysis, thus evidencing what the author felt to be an unwarranted trend toward an expansion of the applicability of the per se approach. Oppenheim, *supra* note 113, at 37–42.

[125] 359 U.S. at 211. For a discussion of the public injury aspect of the *Klor's* decision see Handler, *supra* note 112, at 865–66; 47 CALIF. L. REV. 383, 384–86 (1959); 44 MINN. L. REV. 568, 569–72 (1960). The belief that public injury had to be established in a private antitrust action before a violation would be found had been strengthened by the Court's decision in Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), although it had been alluded to in earlier decisions. *See, e.g.*, Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 610 (1914); Nash v. United States, 229 U.S. 373, 376 (1913). In *Apex* the Court emphasized that the purpose of the Sherman Act was to prevent restraints of trade which resulted in harm to the public. 310 U.S. at 493, 500–01. Although the Court, in Radovich v. National Football League, 352 U.S. 445, 453–54 (1957), appeared to take the position that an injury to a single victim was sufficient, it was not until the Court rendered its decision in *Klor's* that its position became clear. In *Klor's*, the Court stated that when a per se violation of the Sherman Act is alleged, "Congress had determined its own criteria of public harm" and thus it did not matter that the injury did not affect the market. 359 U.S. at 211–13. It has been suggested that the public injury element is still necessary when the private action is based on a restraint of trade which must be judged under the rule of reason. *See* Reliable Volkswagen Sales & Serv. Co. v. World-Wide Auto. Corp., 182 F. Supp. 412, 427 (D.N.J. 1960). *But see* Fleischmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221, 227–28 (S.D.N.Y. 1975).

In cases subsequent to the *Klor's* decision, the Court has consistently held that public injury is not a necessary element to a private antitrust action when the suit is based upon a per se violation of the Sherman Act. *See, e.g.*, Simpson v. Union Oil Co., 377 U.S. 13, 16 (1964); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 708 (1962); *In re* McConnell, 370 U.S. 230, 231 & n.2 (1962); Poller v. Columbia Broadcasting Sys. Inc., 368 U.S. 464, 473 (1962); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659–60 (1961). *See generally* Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 TEXAS L. REV. 1180, 1195–96 (1975).

[126] 359 U.S. at 212 (footnote omitted). The Court cited *Eastern States, Binderup, Fashion Originators', Kiefer-Stewart, Times-Picayune,* and *Northern Pacific* for this proposition. *Id.* at 212 n.5.

effect on prices, production, or quality of goods, nor by the argument that they were reasonable.[127]

Addressing itself to the facts, the Court explained that the complaint did not allege a situation involving an exclusive distributorship agreement between a manufacturer and a dealer[128] nor one where a single trader simply refused to deal with another trader.[129] Rather, the complaint "[a]lleged . . . a wide combination consisting of manufacturers, distributors and a retailer."[130] The Court declared that such a combination injured the business of Klor's and prevented the manufacturers and distributors from selling to Klor's, thus interfering with interstate commerce.[131] It was then asserted that such a combination "clearly has, by its 'nature' and 'character,' a 'monopolistic tendency,' " and that due to this propensity the fact that only one small, single trader is being destroyed is irrelevant, for "[m]onopoly can as surely thrive by" the step-by-step elimination of small, individual traders "as it can by driving them out in large groups."[132] The Court then described the Sherman Act as having been consistently interpreted as prohibiting combinations which have such monopolistic tendencies.[133]

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[127] *Id.* at 212. The Court cited *Fashion Originators'* as authority for this statement. For a discussion of *Fashion Originators'* see notes 68–81 *supra* and accompanying text.

[128] An exclusive distributorship is an arrangement whereby a manufacturer or a seller promises his distributor not to deal with another distributor or buyer in a specified territory. ANTITRUST ADVISOR § 3.24, at 102 (C. Hills ed. 1971). If the exclusive distributorship involves any restrictions upon the right of the distributor to deal in the goods of the manufacturer's competitors, it will be subject to a challenge under the provisions of section 3 of the Clayton Act, 15 U.S.C. § 14 (1970). In United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967), the Court, in dictum, gave qualified approval to an exclusive distributorship agreement. The Court limited its approval by stating that equivalent products must be available and that the arrangement may involve nothing more than a vertical restriction solely on the manufacturer or seller. *Id. See generally* Barber, *Refusals to Deal*, 3 PRAC. LAW. 21, 25–27 (1957); Handler, *Annual Antitrust Review*, 11 RECORD OF N.Y.C.B.A. 367, 368–81 (1956).

[129] 359 U.S. at 212. The Court's holding in United States v. Colgate & Co., 250 U.S. 300, 307 (1919), is frequently cited for the proposition that, in the absence of monopoly, a single trader can make a unilateral decision not to deal with another without incurring antitrust liability. *See, e.g.*, Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1667 (1976); Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1248 (5th Cir. 1975); Ace Beer Distribs., Inc. v. Kohn, Inc., 318 F.2d 282, 286 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963). The statement by the Court in *Klor's* reaffirms the validity of unilateral refusals to deal. For a discussion of the *Colgate* doctrine see 1 HANDLER, *supra* note 2, at 174–75; Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 851–72 (1955); Bohling, *supra* note 125, at 1192–95.

[130] 359 U.S. at 212–13.

[131] *Id.* at 213.

[132] *Id.*

[133] *Id.* at 213–14.

Facially, the decision in *Klor's* seems to preclude any argument that not all group boycotts are per se unreasonable, and some commentators appeared to so concede.[134] Yet not all agree that the controversy has been so handily foreclosed.[135] It has been suggested that the Court "avoid[ed] coming to grips with the dilemma" and that "[a]s a consequence it is very difficult now to know what the rule on boycotts is."[136] Although the Court did positively state that the actual effect on competition is not the determinative consideration, it did stress the size of the combination and its monopolistic tendencies.[137] Thus, the decision could be interpreted as standing for the proposition that when the dominance of the combination suggests that it may have monopolistic tendencies, or when its purpose and effect is to drive the trader out of business, a boycott effectuated by the combination will be considered per se unreasonable. This is so even though the injured party is a small independent trader whose elimination will not significantly affect the market and thus will not be injurious to the public interest.[138]

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[134] One commentator stated that the Court "bluntly and emphatically informed" the courts that when it had previously stated that concerted refusals to deal were per se illegal "it meant precisely what it said." Furthermore, he concluded that "[t]he prohibition is absolute" and contains "no exceptions, however extenuating may be the conditions generating the boycott." Handler, *supra* note 112, at 862, 865. Another author has concluded that the holding of the Court in *Klor's* has "given the antitrust 'kiss of death' to 'Group boycotts, or concerted refusals by traders to deal with other traders.' " Oppenheim, *supra* note 113, at 54–55. This conclusion would seem to leave open the possibility that group boycotts that were noncommercial in nature would not be treated under the per se approach. For a discussion of noncommercial purpose as a defense see Bird, *supra* note 104; Coons, *supra* note 21.

[135] *See* Bird, *supra* note 104, at 275–77; Rahl, *supra* note 111, at 1171–74.

[136] Rahl, *supra* note 111, at 1170. Professor Rahl believes that the Court was afforded an ideal vehicle through which to express the legal principles pertinent to the boycott issue for the following reasons: the fact pattern of the case was relatively simple; the plaintiff did not allege any "reason, purpose, or motive for the combination"; the defendant did not deny the combination but simply alleged that it had caused no public injury; and the plaintiff did not controvert the lack of market effect but simply alleged that the elimination of a sole trader was a violation of section 1. *Id.* at 1165–66. Professor Rahl stated that the Court failed to take advantage of this opportunity to explain and clarify the exact reason why and situation in which concerted refusals to deal are to be considered per se illegal. *Id.* at 1170–71.

[137] 359 U.S. at 208–09, 211, 213. *See* Rahl, *supra* note 111, at 1171.

[138] *See* Comment, *An Affirmative Role for the Rule of Reason: Trade Association Exclusionary Practices*, 66 COLUM. L. REV. 1486, 1497 (1966).

Almost two years after *Klor's*, the Court rendered its decision in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961). There the plaintiff, a manufacturer and seller of ceramic gas burners used in the heating of houses, alleged that the American Gas Association and some of its members had conspired to restrain trade by establishing arbitrary standards of approval which the plaintiff could not meet even though his product was allegedly more efficient and safe, and by refusing to provide gas

The Court's decision, over two years later, in *Silver v. New York Stock Exchange*,[139] did not clarify, but perhaps enhanced, remaining doubts concerning a strict per se approach to group boycotts. Plaintiffs, registered broker-dealers who were not members of the New York Stock Exchange, were in the business of dealing in over-the-counter securities.[140] Both had obtained a variety of direct private wire connections, some of which were with firms who were members of the Exchange.[141] Rules adopted pursuant to the Securities Exchange Act of 1934 mandated that these connections be approved by the Exchange.[142] Although most of plaintiffs' connections had received preliminary approval, they were subsequently disapproved. This action resulted in their being removed without notice and without any explanation. The broker-dealers subsequently brought an action alleging that this conduct violated section 1 of the Sherman Act.[143]

The main issue confronted by the Court concerned the extent to which "the federal antitrust laws apply to securities exchanges regulated by the Securities Exchange Act of 1934."[144] The Court stated

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to unapproved gas burners, thus effectively excluding Radiant Burners from the market. *Id.* at 657–58. The court of appeals held that a group boycott was not established by the allegations and, in the absence of a per se violation, a public injury had to be shown, which the complaint failed to establish. Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 273 F.2d 196, 199–200 (7th Cir. 1959). The Supreme Court, in reversing, rendered an unilluminating opinion based on quoted passages from its decision in *Klor's*. 364 U.S. at 659–60. For the argument that a rule-of-reason approach should have been adopted in this case see Note, *Anti-trust: Trade Association's Refusal to Deal Held a Per Se Violation*, 1961 DUKE L.J. 302, 307.

[139] 373 U.S. 341 (1963). For a discussion of this case see Bird, *supra* note 104, at 274–75; Loevinger, *supra* note 5, at 31–33; Note, *supra* note 138, at 1487–88, 1497–1510.

About one year before the Court issued its holding in *Silver*, it stated in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 708 (1962), that concerted refusals to deal are per se violative of the Sherman Act. Although the restraint challenged therein was a group boycott, the statement could be considered dictum, because the Court was not addressing the merits of the controversy but was discussing the error of the trial court in charging the jury that the conspiracy must have injured the general public. *Id.* Thus the Court did not indulge in any discussion concerning the applicability of the per se rule to group boycotts. For a discussion of the "public injury" concept see note 125 *supra*.

Approximately two months before the *Silver* holding, the Court, in White Motor Co. v. United States, 372 U.S. 253, 259–60 (1963), again in dictum and without extended discussion, stated that "[g]roup boycotts [were] another example of a *per se* violation."

[140] 373 U.S. at 343.

[141] *Id.*

[142] *Id.* at 343–44.

[143] *Id.* at 344–45.

[144] *Id.* at 342. The Court ultimately held that the Exchange had violated section 1 of the Sherman Act because it had exceeded its self-regulatory authority by not affording the plaintiffs notice and a hearing. *Id.* at 364–65.

that it was "plain" that the action of the Exchange and its members would have constituted a per se violation of the Sherman Act in the absence of other federal regulation. This result was based on the finding that the action of the Exchange and its members deprived the plaintiffs "of a valuable business service which" was necessary "in order to compete effectively" and thus constituted a concerted refusal to deal.[145] The Court concluded this discussion by stating that "absent any justification derived from the policy of another statute *or otherwise*," the Sherman Act prohibited the actions of the Exchange.[146] Later in its discussion of the interrelationship between the antitrust laws and the policy of self-regulation by the Exchange, the Court pointed out that the antitrust laws constituted a check on the self-regulatory powers of the Exchange. It was indicated, however, that the antitrust laws could be interpreted "under the aegis of the rule of reason" so as to provide the Exchange with the flexibility needed in order to implement the requirements of the Securities Exchange Act.[147]

It has been suggested that under the *Silver* rationale, a group boycott may be analyzed and perhaps justified under the rule of reason if there is a policy of self-regulation or if there is an inherent industry need for self-regulation. In order to be justified under that rule, however, the alleged restraint must be within the contemplation of that policy, be reasonably related to the accomplishment of that goal, and not be achieved by arbitrary or overly restrictive means.[148]

United States v. General Motors Corp.[149] is the most recent de-

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In Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 660 (1975), the Court was again confronted with the problem of reconciling the Securities Exchange Act of 1934 and the regulatory scheme created thereunder with the antitrust laws. The Court held that fixed commission rates for stock transactions of less than $500,000 were not subject to antitrust prohibitions. *Id.* at 661, 691. The decision allowed the "[i]mplied repeal of the antitrust laws" because it was felt that the application of the antitrust prohibitions "would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity." *Id.* at 691. *See also* United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 729–35 (1975).

[145] 373 U.S. at 347.

[146] *Id.* at 348–49 (emphasis added).

[147] *Id.* at 360.

[148] Comment, *supra* note 138, at 1499–1502, 1504–10. The author drew a comparison between this hypothesis and the Court's decision in *Associated Press* upholding, apparently under a rule-of-reason analysis, by-laws imposing fines and providing for the expulsion of members as disciplinary measures and by-laws which prohibited members from furnishing news to nonmembers. *Id.* at 1502. Although this analogy raises interesting implications, it should be noted that *Associated Press* was decided before the Court had explicitly stated that concerted refusals to deal were per se illegal.

[149] 384 U.S. 127 (1966). For a discussion of this case see E. KINTNER, AN ANTITRUST PRIMER, 38 (2d ed. 1973) [hereinafter cited as KINTNER]; 18 SYRACUSE L.

cision of the Supreme Court addressing the issue of a concerted refusal to deal. In *General Motors*, the Government brought an action against General Motors and three Chevrolet dealer associations in the Los Angeles area alleging that they had joined in a "conspiracy to restrain trade in violation of § 1 of the Sherman Act."[150] The dealers operated pursuant to a franchise arrangement with General Motors under which there were no customer or territorial restrictions except a " 'location clause' " which prohibited a dealer from moving his location or from establishing a branch office in another location without receiving prior written approval from Chevrolet.[151] Many of the dealers were extremely perturbed that other dealers were doing business with " 'discount houses' " and " 'referral services.' "[152] Succumbing to dealer pressure, General Motors announced that it would consider such activities to be a violation of the location clause on the ground that the arrangement effectively established " 'a second and unauthorized sales outlet or location contrary to the provisions of the General Motors Dealers Selling Agreements.' "[153] After General Motors persuaded each of the offending dealers to agree to stop dealing with the discounters, the associations implemented a plan, apparently with the collaboration of General Motors, to police the agreements.[154]

The Court declined to construe the location clause or to evaluate its validity, stating that it was not a pertinent inquiry. This refusal

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REV. 89 (1966). In a later case, Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238, 250 (1968), the Court, in dictum, stated that "any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*." *See also* United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 729 (1975), wherein the Court stated that, in the absence of other federal regulation, a group boycott would constitute a per se violation of section 1 of the Sherman Act.

[150] 384 U.S. at 129 (footnote omitted).

[151] *Id.* at 130. Under the franchise agreement, dealers could sell to any customer. Furthermore, the agreement contained no territorial restrictions defining the area in which the dealer was allowed to sell. *Id.*

[152] *Id.* at 130–33. Although there existed a variety of different relationships between the Chevrolet dealers and the discounters, two arrangements were the most common. One was a referral arrangement whereby the discounter would refer the buyer to the dealer who would then sell the car to the buyer at a price agreed upon between the discounter and the dealer, the discounter receiving a set fee. Another arrangement involved the dealer transfering the car to the buyer at the discounter's direction, the dealer receiving a set price and the discounter negotiating the best price possible. *Id.* at 131.

[153] *Id.* at 133–36.

[154] *Id.* at 135–38. The associations hired a professional investigator who would attempt to obtain automobiles from the discounters. If the investigator was successful, he would report the details to the association. *Id.* at 137. Individual dealers would also police the agreements in this manner. *Id.* The offending dealer, after having been reprimanded, would promise not to make similar sales in the future and would repurchase the car, sometimes at a loss. *Id.*

was based upon the finding that the actions of the dealers and of General Motors infringed upon the freedom of the franchised dealers to deal with whom they pleased, and that the resultant exclusion of a group of competitors from the market was "a classic conspiracy in restraint of trade."[155] After discussing the legal aspects of the conspiratorial arrangement,[156] the Court declared that the combination had the effect of restraining trade and that such action was "a *per se* violation of the Act."[157]

The Court proceeded to discuss its prior holding in *Klor's*[158] and

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[155] *Id.* at 139–40.

[156] *Id.* at 140–45. The district court had found that the arrangement did not constitute a combination or conspiracy because each party had been acting in his own self-interest, that securing compliance with the location clause was a lawful interest, and that, although there was parallel conduct, there had been no agreement to secure such compliance. United States v. General Motors Corp., 234 F. Supp. 85, 88–89 (S.D. Cal. 1964). In reversing this finding, the Court held that the lower court had failed to apply the correct legal "standard for ascertaining the existence of a combination or conspiracy," in that the need to establish an explicit agreement had long been held to be unnecessary. 384 U.S. at 141–43.

The Court did not state whether it viewed the conspiratorial arrangement between General Motors and the dealers as a vertical combination or a horizontal one. It is doubtful that the Court viewed the arrangement solely as a vertical combination for a number of reasons, in addition to the fact that the Court recognized that not only had the dealers acted in collaboration with General Motors, but had also combined among themselves. *See id.* at 140–41, 143. First, the Court had never before held that a vertical group boycott, in the absence of a price-fixing arrangement, was illegal per se and, in fact, had never dealt with this type of restraint implemented by a vertical combination. Furthermore, the Court has usually been more hesitant in holding vertical restraints subject to the per se rule. *See* note 10 *supra*. Finally, although the Court did compare the illegal activities of General Motors to those of the defendant in United States v. Parke, Davis & Co., 362 U.S. 29 (1960), a case involving a vertical price-fixing agreement, a later decision of the Court made reference to the *General Motors* decision as an example of a horizontal restraint. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372–73 (1967) (comparison of vertical restraints where "[t]he source of the restrictions is the manufacturer," with horizontal restraints implemented by "distributors with or without the manufacturer's participation," citing *General Motors* and *Klor's* as examples of the latter arrangement). *See also* White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (comparison of vertical restraints with horizontal territorial restrictions and group boycotts, viewing the latter as naked restraints of trade). One author has noted that although the combinations in *Klor's* and *General Motors* had elements of both vertical and horizontal restraints, the Court did not expressly condemn the vertical element standing alone. *See* Bohling, *supra* note 125, at 1212–13.

[157] 384 U.S. at 145.

[158] *Id.* at 145–46. The Court stated that its decision in *Klor's* stood for the proposition that "[g]roup boycotts of a trader . . . are among those 'classes of restraints which' " by their very nature are overly restrictive. *Id.* at 146 (quoting from 359 U.S. at 211). The Court's emphasis on the business aspect of a group boycott may be support for the proposition that the per se application is to be reserved for commercial restraints in contrast to noncommercial restraints. For a general discussion of noncommercial purpose as a defense to an antitrust action see Bird, *supra* note 104; Coons, *supra* note 20.

cited *Northern Pacific*, *Fashion Originators'*, and *Eastern States* for the proposition that group boycotts are per se unreasonable.[159] The Court then announced that

> [t]he principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct.[160]

The use of a combination or conspiracy to exclude traders from the market was found to be "so inconsistent with the free-market principles embodied in the Sherman Act that it is not . . . saved by" any excuse.[161]

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[159] 384 U.S. at 146. The Court specifically stated that in *Fashion Originators'* and *Eastern States*, price-fixing had not been a factor which affected the decisions that the concerted refusals to deal were a violation of the antitrust laws. *Id.*

[160] *Id.* The Court referred to Barber, *supra* note 129, at 872–85, which is curious, especially in light of the fact that Barber is cited by the lower federal courts when holding that group boycotts are not per se illegal in all circumstances. *See, e.g.*, Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119, 124–30 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 77–78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

It is important to note at the outset that the Barber article was written after the Court had propounded the per se illegal rule relative to group boycotts in dicta, but before the Court had actually held a concerted refusal to deal per se unreasonable. Barber contended that there are crucial distinctions between coercive group boycotts intended to exclude third parties and refusals to deal resulting from a contractual relationship which indirectly affects third parties. Barber, *supra* at 872. In the former situation, he felt that although there may be justifiable reasons for the boycott, the possibility that competition may be harmed outweighs any justification based upon self-protection. *Id.* at 876. Barber stated that in the latter category of concerted action the inquiry should be directed toward whether the purpose or effect was to unreasonably exclude third persons from the market. *Id.* Barber discussed the holding in *Associated Press* and the dicta in *Columbia Steel* and *Times-Picayune* and stated that "voluntary acceptance of limitations on one's own freedom to deal with others dissociated from a purpose to coerce or to exclude is not necessarily unlawful." *Id.* at 877–79. Advocating that the purpose and effect of the combination should be viewed "in the context of its operation," he stated that *Associated Press* does not mandate a different result. He then concluded that, in this area, "the public interest requires careful regard for the balancing of competing interests within the framework of the rule of reason." *Id.* at 879 (footnotes omitted). Thus, the question arises as to whether the Court meant to adopt Barber's distinctions between coercive group boycotts and incidental refusals to deal resulting from joint ventures and contractual relations which only indirectly affect the excluded party.

[161] 384 U.S. at 146–47. The Court also took note of the fact that such an arrangement, if successful, would result in an effect on prices, which is itself a per se violation of the antitrust laws. *Id.* at 147. Although the Court did find evidence which established that one of the purposes behind the combination was to protect against price competi-

Although the Court appears to have foreclosed any possibility that an action based upon a concerted refusal to deal may be successfully defended by establishing that the restraint was reasonable, there still may be a glimmer of doubt if the language employed by the Court is carefully scrutinized. The Court seemed to stress the commercial aspects of the combination, possibly leaving restraints imposed for noncommercial purposes to a reasonableness analysis. By noting that the alleged coconspirators combined in order to exclude someone from the market or in order to force compliance with a desired trade practice, the possibility that purpose and motive were to be given some consideration was not foreclosed. The Court also reiterated its previous statement in *Klor's* which appeared to imply that the economic strength of the combination was a factor to be taken into consideration. Additionally, it should be pointed out that the boycott combinations which have been condemned by the Court have been ones in which the primary element has been of a horizontal nature, thus leaving open the strong likelihood that a purely vertical group boycott would be scrutinized under a less restrictive standard.

The decisions in *Klor's* and *General Motors* appear to foreclose any considerations of purpose and motive when determining the validity of a horizontal concerted refusal to deal.[162] Lower federal courts, however, in subsequent decisions, have focused upon the ambiguities which have been pointed out in order to find activities challenged as group boycotts to be subject to the rule of reason rather than the per se rule. In reviewing the legal analyses of the various circuits, certain definite trends become apparent. For instance, in the determination that the rule of reason is the proper standard to apply, courts have focused upon the noncommercial motives of the combination. Decisions have also been based on the absence of anticompetitive motive or intent. The enforcement of self-regulatory association rules directed toward the furtherance of legitimate association objectives, even though incidentally affecting non-members, will sometimes be a determinative consideration. Another area in which the courts have applied the rule of reason is when a manufacturer replaces his existing distributor, even though the termination is done pursuant to an agreement with the new distributor. After examining the analyses employed by the courts in each circuit to avoid the application of the per se rule, the trends which appear will be categorized and discussed.

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tion, *id.*, this finding did not appear to affect or influence the Court's holding relative to the group boycott issue.

[162] *See* KINTNER, *supra* note 149, at 37.

POSITIONS TAKEN BY THE LOWER FEDERAL COURTS AFTER *KLOR'S*

In a noncommercial setting, the District of Columbia Circuit has held that when the challenged restraint is not motivated by commercial objectives and trade is only incidentally restrained, the antitrust laws do not apply "absent an intent or purpose to affect the commercial aspects of the profession."[163] In an earlier case affirmed by the

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[163] Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650, 652–55 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (footnote omitted). In *Marjorie Webster*, the plaintiff college alleged that a policy of the defendant Association, which prevented accreditation from being accorded to an institution which was run for profit, was a violation of the Sherman Act. 432 F.2d at 652–53. At the trial level, the plaintiff contended that the rule was per se unreasonable, but the court found the rule to be an unreasonable restraint of trade. Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 302 F. Supp. 459, 462, 469 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970). For a discussion of the decision of the district court see Comment, *The Liability of Private Accrediting Associations Under the Sherman Act, the Constitution, and the Common Law*, 11 B.C. IND. & COM. L. REV. 285 (1970); 21 CASE W. RES. L. REV. 314 (1970); 44 N.Y.U.L. REV. 1014 (1969).

At the appellate level, the plaintiff apparently did not rely on the argument that a per se violation was involved, but rested on the district court's finding of unreasonableness. *See* 432 F.2d at 653 n.7. In reversing the decision of the trial court, *id.* at 659, the appellate court determined that the Sherman Act was directed toward the commercial world, not "the noncommercial aspects of the liberal arts and the learned professions" which would include the accreditation process of educational institutions, *id.* at 654–55 (footnote omitted). For a critical discussion of the decision of the court of appeals see 84 HARV. L. REV. 1912 (1971); 56 VA. L. REV. 1492 (1970).

The *Webster* court's reliance on the liberal arts and learned profession aspect of the challenged conduct may have been partially discredited by the more recent decision of the Supreme Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). In *Goldfarb*, the Court rejected the defendants' argument "that Congress never intended to include the learned professions within the terms 'trade or commerce' in § 1 of the Sherman Act," *id.* at 785–86 (footnote omitted), and held that "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act," *id.* at 787. The Court did state, however, that

> [t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

Id. at 787–88 n.17. *See generally* Robinson, *Recent Antitrust Developments: 1975*, 76 COLUM. L. REV. 191, 191–215 (1976); Shenfield, *Annual Survey of Antitrust Developments 1974–75*, 33 WASH. & LEE L. REV. 259, 293–98 (1976).

same circuit, the trial court denied plaintiffs' motion for a preliminary injunction, due to the determination that the rule of reason may be the proper legal standard to apply to group boycotts "[w]here there is absence of an anticompetitive motive" or "where the motives for exclusion are not directly profit related."[164] Although in a later district court case it was recognized that group boycotts had been categorized as per se illegal, thus excluding any consideration of motive, that court bluntly stated that a number of circuits had refused to apply the per se standard to group boycotts.[165] The court "believe[d] the correct rule to be that" group boycotts should be subject to the per se rule "only if exclusionary purpose or effect and lack of legitimate competitive purpose are obvious from the nature of the combined action" or evidentially proven.[166]

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[164] Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F. Supp. 988, 994 (D.D.C.), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970). In *Dalmo*, the plaintiff brought an action against a developer and operator of shopping centers and three shopping center tenants. It was contended that the defendants had prevented it from renting space in a shopping center pursuant to a clause in the lease which gave the three tenant defendants the right to disapprove prospective tenants. Plaintiff claimed that this constituted a group boycott violative of the Sherman Act. 308 F. Supp. at 989–93. The court stated that the group boycotts which the Supreme Court had held to be per se violations of the Sherman Act "involved significant anticompetitive motives." *Id.* at 994. The evidence relating to the motive and purpose of two of the tenant defendants, in disapproving plaintiffs, was viewed as conflicting. The court felt that because the rule of reason might be applicable, due to the lack of anticompetitive motive or non-profit-related motives, the "novel legal issues" presented by the fact situation required a trial. Thus, the court denied preliminary injunctive relief. *Id.* The court suggested that since the success of a shopping center was dependent upon long term leases from large department stores, the financial stake of these store owners perhaps entitled them to the opportunity to approve other prospective tenants "without being subject to the *per se* rule of illegality applied to group boycotts." *Id.* at 994–95.

For a discussion of the antitrust problems inherent in the selection of tenants for shopping centers see Rowley & Donohoe, *Antitrust Implications of Tenant Selection Practices in Regional Shopping Centers:* Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 11 B.C. IND. & COM. L. REV. 899 (1970). The authors suggest that the decisions in *Dalmo* and several other related cases indicate that when a group participates in a joint enterprise, the exclusion of possible associates is not a group boycott subject to the per se unreasonable standard. *Id.* at 907.

[165] Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151, 160–62 (D.D.C. 1975). In Smith v. Pro-Football, 1976 Trade Cas. ¶ 61,050, at 69,739–41 (D.D.C. Sept. 8, 1976), however, the court held that the NFL player draft, in its present form, was per se unreasonable as well as illegal under the rule of reason.

[166] Chastain v. American Tel. & Tel. Co., 401 F. Supp. 151, 161 (D.D.C. 1975). In *Chastain*, plaintiffs made a motion for summary judgment based upon the contention that AT & T and its subsidiaries had taken part in a group boycott of the product distributed by the plaintiffs, a mobile telephone, by refusing to provide the product with mobile service. *Id.* at 153–54, 157–58. The court determined that issues of fact existed as to the motive for and the effect of the defendant's policy. The court held that

The First Circuit court of appeals, in a case decided soon after the Supreme Court rendered its decision in *General Motors*, extended the per se approach by applying it to an arrangement that was essentially a vertical group boycott.[167] A later decision by a district court in the First Circuit appears, however, to have significantly retreated from such a stance. The district court espoused the interpretation of the Sherman Act which describes it as being primarily directed toward "combinations with commercial objectives."[168] It was thus held that the antitrust laws were not applicable to the challenged noncommercial activity.[169] The court expanded its holding by stating that, even if it were appropriate to apply the antitrust laws, allegations of an anticompetitive purpose were necessary to establish a group boycott as per se violative of antitrust laws. It was determined that the critical inquiry in a case alleging a concerted refusal to deal "is not merely the existence or nonexistence of" a group boycott.[170] Rather, the determinative issue was whether the combination intended "to exclude outsiders from participation in the marketplace."[171] Finding it unlikely that the plaintiff would be able to es-

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the per se rule is applicable only when anticompetitive effect or purpose are obvious or proven, and thus denied the motion. *Id.* at 161–62.

[167] Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 880–83 (1st Cir. 1966). In *Ford Motor*, the plaintiff was a used car dealership which obtained used Ford automobiles through an authorized Ford dealer who had bought them from Ford through competitive bidding. *Id.* at 876–77. Due to a complaint by another Ford dealer, Ford Motor sent a letter to other dealers asking them not to bid on the cars with the intention of then selling them to a wholesaler. *Id.* at 877. Subsequent to this letter, the plaintiff's ability to obtain used Fords in this manner decreased, causing him to institute suit alleging that these actions constituted a group boycott per se violative of the Sherman Act. *Id.* at 878. Although the plaintiff alleged the existence of a horizontal combination among the dealers, the court determined that there was "no evidence . . . of a direct horizontal agreement among" the retailers, but that there were a series of vertical agreements between the defendant and its dealers. *Id.* at 880. The court compared the combination in *General Motors*, stating that in that case there was "a single, vertical-horizontal agreement to which the manufacturer and all collaborating dealers were parties" rather than a series of vertical arrangements. *Id.* at 880, 882–83. Yet the court interpreted the *General Motors* decision as precluding any combination of businessmen which acted to deny others access to products and thus found it irrelevant that the concerted refusal to deal took "its shape and strength from a series of vertical agreements rather than from a single vertical-horizontal agreement." *Id.* at 882–83. *See also* Hub Auto Supply, Inc. v. Automatic Radio Mfg. Co., 173 F. Supp. 396, 396–97 (D. Mass. 1959); Bohling, *supra* note 125, at 1212–16.

[168] Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975). In *Jones*, the plaintiff challenged a determination made by the National Collegiate Athletic Association that he was ineligible to play intercollegiate hockey due to his failure to comply with the rules concerning amateurism. *Id.* at 296–98.

[169] *Id.* at 303.

[170] *Id.* at 303–04.

[171] *Id.*

tablish such a motive, the court denied his motion for a preliminary injunction.[172]

Although the Second Circuit court of appeals has stated that group boycotts are per se violations of the antitrust laws,[173] it has often declined to follow that standard. For instance, it has relied on the lack of an intentional refusal to deal to deny a plaintiff's claim that the challenged conduct was per se illegal and should be evaluated without any consideration of motive or justification.[174] In what would probably be classified as a noncommercial setting, a district court in the Second Circuit has held that a concerted refusal to deal by an association and its members, pursuant to a reasonable regulation, was not an unreasonable restraint of trade when an association member, the object of the conspiracy, had violated a reasonable

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[172] *Id.* at 304.

[173] *See, e.g.*, Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3275 (U.S. Oct. 12, 1976); Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140, 1143 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975). *Accord*, B. A. M. Liquors, Inc. v. Satenstein, 1976 Trade Cas. ¶ 60,997, at 69,413 (S.D.N.Y. July 19, 1976); Harlem River Consumers Cooperative, Inc. v. Associated Grocers, 1976 Trade Cas. ¶ 60,820, at 68,569 (S.D.N.Y. Mar. 5, 1976); Harlem River Consumers Cooperative, Inc. v. Associated Grocers, 1975 Trade Cas. ¶ 60,549, at 67,400 (S.D.N.Y. 1975); Manway Constr. Co. v. United States Housing Authority, 1975 Trade Cas. ¶ 60,488, at 67,155 (D. Conn. 1975); Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35, 43 (S.D.N.Y. 1974).

[174] International Rys. of Central America v. United Brands Co., 532 F.2d 231, 240–41 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3251 (U.S. Oct. 4, 1976). In this case, the plaintiff railroad company had been controlled by the defendant, a banana producer, until a consent decree terminating a civil antitrust complaint ordered the defendant to sell the stock it held in the plaintiff. *Id.* at 234–35. Later, in response to various problems in the banana market, a new strain of banana was developed which was more resistant to disease and bad weather but which was unable to withstand long train hauls. *Id.* at 237–38. Therefore, the defendant decided to abandon certain out-of-the-way banana-producing areas served by the railway. *Id.* at 238–39.

Plaintiff alleged that the defendant refused to deal with it, and that by not selling the property or by selling it with restrictions, others were prevented from dealing with the plaintiff. *Id.* at 238, 242. Assuming that there was a conspiracy, but declining to apply the per se rule, the court determined that it "would indeed be an intolerable application of the Sherman Act" to find a violation due to the abandonment of a business for legitimate business reasons. *Id.* at 241. *See also* Sum of Squares, Inc. v. Market Research Corp. of America, 401 F. Supp. 53, 56–58 (S.D.N.Y. 1975).

It has also been stated that an inquiry into the intent of the parties is relevant. *See, e.g.*, Harlem River Consumers Cooperative, Inc. v. Associated Grocers, 408 F. Supp. 1251, 1283–85 (S.D.N.Y. 1976); Levin v. National Basketball Ass'n, 385 F. Supp. 149, 152 (S.D.N.Y. 1974). In Taxi Weekly, Inc. v. Metropolitan Taxicab Bd. of Trade, Inc., 539 F.2d 907 (2d Cir. 1976), the court found that the defendants' conduct exhibited the requisite anticompetitive intent needed to establish an antitrust violation. Thus, it was deemed unnecessary "to decide if liability could have been predicated . . . on a *per se* group boycott theory in the absence of such evidence." *Id.* at 913 & n.3.

rule which governed the association.[175]

In a situation in which a manufacturer terminates business dealings with one dealer or distributor and substitutes another in its place, the Second Circuit has stated that even if the termination and substitution were done pursuant to an agreement with the new dealer or distributor, no per se violation of the antitrust laws has occurred.[176] Arrangements of this type generally take the form of a vertical combination; yet, when the combination develops into a vertical-horizontal conspiracy, the same circuit has held it illegal.[177]

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[175] Molinas v. National Basketball Ass'n, 190 F. Supp. 241, 243–44 (S.D.N.Y. 1961). *See also* Heldman v. United States Lawn Tennis Ass'n, 354 F. Supp. 1241, 1252 (S.D.N.Y. 1973). In *Molinas*, the plaintiff, a professional basketball player, had been suspended from the league, in accordance with a provision contained in his contract and a league rule, for wagering on his own games. The plaintiff alleged that the association and the member teams had entered into a conspiracy in restraint of trade. 190 F. Supp. at 242.

In Lowe v. International Air Transp. Ass'n, 1975 Trade Cas. ¶ 60,668, at 67,928–29 (S.D.N.Y. Jan. 9, 1976), the court, dealing with a commercial setting, noted that "[e]xceptions to the *per se* rule have been recognized where trade association boycotts have been determined to be reasonable in furtherance of legitimate policies." A violation of section 1 of the Sherman Act, however, was found because the plaintiff had not been afforded the procedural safeguards provided for in the rules approved by the Civil Aeronautics Board. *Id.*

It is also interesting to note Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118, 133–39 (S.D.N.Y. 1972), wherein plaintiff was suspended from an association due to his violation of a trade association rule which was ultimately held to be an illegal price-fixing arrangement. Even though there had been no explicit request by or agreement with the association to refuse to deal with the plaintiff, it was determined that the suspension was intended to have that effect. The court thus found the association and several of its members liable for the association members' and others' resultant refusal to deal with the plaintiff. *Id.* at 139–42. The court stated that even though

> the fact that the purposes and acts of a trade body formed to improve standards of conduct and methods are otherwise beneficial does not immunize the imposition by that body of limitations upon the freedom of competitors such as occurred here. . . . There is a "very real difference" between the use of self-regulation to further such purposes and an effort by the Association to hamper ability to do business of a firm which refuses to abide by a regulation which itself is an unlawful arrangement concerning the prices of the goods which members sold.

Id. at 140–41 (citation omitted). For a discussion of the *Vandervelde* case see Burris & Mayne, *Developments in Antitrust During the Past Year*, 41 A.B.A. ANTITRUST L.J. 656, 699–705 (1972).

[176] Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1667 (1976). *Accord*, Bay City-Abrahams Bros. v. Estee Lauder, Inc., 375 F. Supp. 1206, 1215–16 (S.D.N.Y. 1974); Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1326 (E.D.N.Y. 1970), *aff'd*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972); Potter's Photographic Applications Co. v. Ealing Corp., 292 F. Supp. 92, 103–05 (E.D.N.Y. 1968).

[177] *See, e.g.*, Bowen v. New York News, Inc., 522 F.2d 1242, 1256–57 (2d Cir. 1975),

Courts in the Third Circuit, while reiterating the position that concerted refusals to deal are per se invalid,[178] have found exceptions to the rule and have held that certain fact situations should not be labeled group boycotts. In one case, the Third Circuit court of appeals stated that when one seeks to apply the per se rule, it must be determined whether "the activities of defendants properly fall within the 'group boycott' categorization."[179] The court noted that the phrase "group boycott" encompasses a wide range of activities, some of which should not necessarily be prohibited.[180] Previous Supreme Court decisions were analyzed, and the court concluded that it is only when there is an anticompetitive purpose or objective that the concerted refusal to deal constitutes a group boycott subject to the

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cert. denied, 96 S. Ct. 1667 (1976). *See also* Fleischmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221, 228 (S.D.N.Y. 1975); Potter's Photographic Applications Co. v. Ealing Corp., 292 F. Supp. 92, 104 (E.D.N.Y. 1968).

[178] *See, e.g.*, McCleery Tire Serv., Inc. v. Texaco, Inc., 1975 Trade Cas. ¶ 60,581, at 67,543 (E.D. Pa. 1975); Quigley v. Exxon Co. U.S.A., 376 F. Supp. 342, 351–52 (M.D. Pa. 1974); Intermar, Inc. v. Atlantic Richfield Co., 364 F. Supp. 82, 99–100 (E.D. Pa. 1973); Jones Knitting Corp. v. Morgan, 244 F. Supp. 235, 238–39 (E.D. Pa. 1965), *rev'd on other grounds*, 361 F.2d 451 (3d Cir. 1966).

[179] De Filippo v. Ford Motor Co., 516 F.2d 1313, 1317 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975). In *De Filippo*, the plaintiffs alleged that defendant, Ford Motor Company, and some of its franchised dealers, had participated in a group boycott which constituted a per se violation of section 1 of the Sherman Act. The claim was based upon Ford's withdrawal, allegedly caused by dealer complaints and pressure, of certain advantageous terms offered to the plaintiffs when negotiating for their acquisition of a new dealership. 516 F.2d at 1315–16. The trial court had entered judgment for the plaintiffs based upon their theory of relief. De Filippo v. Ford Motor Co., 378 F. Supp. 456, 464 (E.D. Pa. 1974). For a discussion of the decision of the trial court see 26 MERCER L. REV. 987 (1975). This holding was reversed by the court of appeals based upon the finding that the combination did not completely preclude plaintiffs from acquiring the dealership, but only deprived them of the opportunity of becoming a Ford dealer upon special terms. 516 F.2d at 1320–21, 1324. For a discussion of the circuit court decision see 21 VILL. L. REV. 530 (1976).

[180] De Filippo v. Ford Motor Co., 516 F.2d 1313, 1317–18 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975).

[181] De Filippo v. Ford Motor Co., 516 F.2d 1313, 1318 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975). *Accord*, Mogul v. General Motors Corp., 391 F. Supp. 1305, 1310–11 (E.D. Pa. 1975), *aff'd mem.*, 527 F.2d 645 (3d Cir. 1976); College Athletic Placement Serv., Inc. v. National Collegiate Athletic Ass'n, 1975 Trade Cas. ¶ 60,117, at 65,266 (D.N.J.), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974); Instant Delivery Corp. v. City Stores Co., 284 F. Supp. 941, 947 (E.D. Pa. 1968). In *Instant Delivery*, the defendants were department stores who had previously utilized a consolidated delivery service because it had been found to be the most economical and efficient delivery method. Because of labor difficulties, this service was terminated and two of the defendant department stores employed the plaintiff, who understood that it was to be a temporary arrangement. *Id.* at 943. Eventually the defendants decided to reinstitute a consolidated delivery service and hired a competitor of plaintiff. *Id.* at 945–46. In holding that the challenged conduct was not a per se violation of section 1 of the Sherman Act, the court

per se rule.[181] In another case, the posture of which was essentially noncommercial, the court declined to apply the per se unreasonable rule because no anticompetitive motive was established. It was stated that "not only is there no anti-competitive intent, there is . . . no competition."[182] The court then held that the defendant association's adoption of a rule which evidenced no anticompetitive motives, but which had the noncommercial objective "of preserving educational standards in its member institutions," was not prohibited by the Sherman Act.[183]

The Third Circuit has also taken a position similar to that taken by the Second Circuit by consistently holding that, absent an anticompetitive intent or resultant restraint of trade, one may terminate business relations with one's distributor and engage a new one without violating the antitrust laws. This is so even though the new distributor may have solicited the substitution and the agreement to effectuate the transfer was consummated prior to the termination.[184]

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stated that there was no intent to restrain competition but, rather, merely a business decision to reestablish a consolidated delivery service, the necessary effect of which was to exclude one of the parties competing for the contract. *Id.* at 947. The court held that the reasonableness of the restraint could only be determined at trial. *Id.* at 948.

This case appears to be an excellent example of a refusal to follow the holdings of the Supreme Court. The facts evidenced a horizontal agreement and a refusal to deal, thus establishing the elements of a group boycott. Under the per se rationale, the conduct should have been declared unreasonable per se. Yet, if the situation is analyzed, to hold this conduct per se unreasonable without an examination of motive or effect, would effectively preclude businesses from joining together, even for the purpose of a more efficient and economical business organization. It is interesting to note that a court in the Fifth Circuit has suggested that there may be inherent differences in the considerations attendant to a refusal to buy, as was the case in *Instant Delivery*, and a refusal to sell. *See* American Tel. & Tel. Co. v. Delta Communications Corp., 408 F. Supp. 1075, 1101 (S.D. Miss. 1976).

[182] College Athletic Placement Serv., Inc. v. National Collegiate Athletic Ass'n, 1975 Trade Cas. ¶ 60,117, at 65,266–67 (D.N.J.), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974). In this case, plaintiff was in the business of locating college athletic scholarships for students in return for a fee paid by the parents of the student. 1975 Trade Cas. at 65,265. Defendant promulgated an amendment to its constitution, the effect of which was to render ineligible any student who made use of the plaintiff's service. Plaintiff brought an action contending that this provision constituted a group boycott which it argued was a per se violation of the antitrust laws. *Id.*

[183] College Athletic Placement Serv., Inc. v. National Collegiate Athletic Ass'n, 1975 Trade Cas. ¶ 60,117, at 65,267 (D.N.J.), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974).

[184] Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972). *Accord*, V. & L. Cicione, Inc. v. C. Schmidt & Sons, 403 F. Supp. 643, 648–49 (E.D. Pa. 1975); Mogul v. General Motors Corp., 391 F. Supp. 1305, 1309–12 (E.D. Pa. 1975), *aff'd mem.*, 527 F.2d 645 (3d Cir. 1976); Marder v. Conwed Corp., 378 F. Supp. 109, 110–11 (E.D. Pa. 1974); Peerless Dental Supply Co. v. Weber Dental Mfg. Co., 283 F. Supp. 288, 289–90 (E.D. Pa. 1968). Yet in Allied Elec. Supply Co. v. Motorola, Inc., 369 F. Supp. 133, 136–37 (W.D. Pa. 1973), the court, although holding that the termination was not a

This approach also has been impliedly approved by courts in the Fourth Circuit[185] and has been consistently followed by Fifth Circuit courts.[186]

In an area outside of the termination-of-distributorship situation, the Fifth Circuit court of appeals, while conceding that the challenged activity constituted a concerted refusal to deal,[187] determined that the per se rule was inapplicable.[188] The court interpreted the

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per se violation of the antitrust laws, held that there were enough facts alleged showing anticompetitive motives to allow the case to go to trial. *See also* Peerless Dental Supply Co. v. Weber Dental Mfg. Co., 299 F. Supp. 331, 333–34 (E.D. Pa. 1969). For a brief review of *Ark Dental* see Burris & Mayne, *supra* note 175, at 696–97.

[185] *See, e.g.*, Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568, 575–76 (D. Md. 1975); L. S. Good & Co. v. H. Daroff & Sons., 263 F. Supp. 635, 646–47 (N.D. W. Va. 1967).

[186] *See, e.g.*, Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1246, 1248–49 (5th Cir. 1975); LaMarca v. Miami Herald Publishing Co., 395 F. Supp. 324, 327 (S.D. Fla.), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975); Millcarek v. Miami Herald Publishing Co., 388 F. Supp. 1002, 1005–06 (S.D. Fla. 1975); Bougeois v. A. B. Dick Co., 386 F. Supp. 1094, 1097 (W.D. La. 1974); Holly Springs Funeral Home, Inc. v. United Funeral Serv., Inc., 303 F. Supp. 128, 136–37 (N.D. Miss. 1969). However, in Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 364 F.2d 957, 968 (5th Cir. 1966), the court acknowledged the "respectable authority for the proposition that a conspiracy to terminate a distributorship and appoint a new distributor is not *per se*" illegal. Nonetheless, it was determined that, when the combination had as its purpose the elimination of discount dealers by cutting off their source of supply through the termination of the distributor who sold to jobbers who sold to the discounters, a different result might be mandated by the Supreme Court's decision in *General Motors*.

[187] E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). In Sulmeyer v. Coca Cola Co., 515 F.2d 835, 845 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976), the court found that the challenged activity did not fall "within the group boycott definition." Although the practical effect of the defendant's promotional program was to deprive plaintiff of a marketing outlet, there was no explicit agreement to exclude plaintiff. Furthermore, the defendant did not require the marketing outlet to discontinue or refuse to handle plaintiff's product. *See also* American Family Life Assurance Co. v. Blue Cross, 486 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974).

[188] E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186–88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). In *McQuade*, the plaintiff, a wholesaler of tour packages, contended that the airlines and a committee composed of airline representatives, which published a manual of available tour programs, had violated section 1 of the Sherman Act by refusing to publish certain McQuade tours. The failure to publish centered upon certain policies to list only one wholesaler per hotel and a later revision in policy to allow more than one wholesaler, but only on the condition that he submit written authorization from the hotel. 467 F.2d at 181–82. Although McQuade had entered into contracts with various hotels and had submitted these contracts, he failed to submit the written authorization, thus precipitating the defendants' failure to publish his tour in the manual. *Id.* at 182. After determining that the rule of per se illegality is not applicable to all group boycotts, the Court found that there had been no coercive conduct or exclusionary intent on the part of the defendants and that there had been no conspiracy between defendants and plaintiff's competitors. *Id.* at 187–88. The court thus concluded that the application of the rule of per se illegal-

Supreme Court cases which had applied the per se rule to group boycotts as falling "into roughly three categories."[189] The first category was viewed as having "involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market."[190] The second group was categorized as "involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination."[191] The court determined that the third classification was illustrated by arrangements which were "designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors."[192] This analysis led the court to state that "the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question."[193] It was then noted that when "exclusionary or coercive conduct has been present," the restraint has been judged by reference to the per se approach, but in the absence of such conduct, the rule of reason has been applied.[194] The court concluded its legal analysis by holding

> that resort to the *per se* rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the ar-

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ity was not appropriate and that the conduct of the defendant was not unreasonable. *Id.* at 188. For a brief review of the *McQuade* decision see Mayne, *Developments in Antitrust During the Past Year 1972–1973*, 42 A.B.A. ANTITRUST L.J. 751, 780–81 (1973).

[189] E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

[190] *Id.* The court categorized *Eastern States*, *Associated Press*, and *Silver* as exemplifying this type of arrangement. *Id.*

[191] *Id.* The *McQuade* court determined that the restraint condemned in *Klor's* was an example of this category. 467 F.2d at 186–87. Although the court did not mention *General Motors*, the arrangement held invalid in that case also could probably be so classified.

In Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc., 365 F.2d 478, 484–85 (5th Cir. 1966), the court, on the authority of the decision in *General Motors*, held that a complaint, alleging that a two-party vertical combination had engaged in a concerted refusal to deal, stated a claim upon which relief could be granted. *But see* Richardson v. Chrysler Motors Corp., 257 F. Supp. 547, 554 (S.D. Tex. 1966) ("a horizontal conspiracy between competitors of the same level is prohibited" but "a vertical conspiracy between manufacturer-distributor and its retail dealers" is not).

[192] E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). The court cited *Fashion Originators'* as an example of this category. In Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347, 1364–65 (5th Cir. 1976), the court determined that the challenged practices fell into this third category and thus held them to be per se unreasonable.

[193] E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

[194] *Id.*

rangement in question is a "naked restraint of trade." Absent these factors, the rule of reason must be followed in determining the legality of the arrangement.[195]

Rather than following the approach of the other circuits when dealing with what may be considered, in some circumstances, a noncommercial situation, a district court in the Fifth Circuit has applied the per se rule, in a novel fashion, to the medical profession.[196] The

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[195] *Id.* In a district court case subsequent to *McQuade*, the court, relying on the *McQuade* rationale, determined that the requisite purpose and effect had been established and held the restraint per se unreasonable. *See* Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260, 1265–66 (N.D. Ga. 1973). The *Blalock* case is interesting in that the conduct condemned was the plaintiff's suspension from the defendant professional golf association which had been based upon allegations that plaintiff had cheated in a tournament. *See id.* at 1262. Similar sanctions implemented by athletic associations have been upheld by other courts premised upon the noncommercial objectives of the association, the reasonableness of the rules of the association, and the necessity for internal regulation. *See* notes 168–69 *supra* and accompanying text; notes 203–05 *infra* and accompanying text. The *Blalock* court found objectionable the following facts: that plaintiff had originally only been put on probation and fined; that the suspension occurred later, at a meeting of which plaintiff had no notice; that the plaintiff was not afforded a hearing; and that certain members of the committee were plaintiff's competitors. 359 F. Supp. at 1265. The court rejected the defendants' argument, which had been based upon the *Silver* rationale, that the appropriate standard to apply was the rule of reason because "the suspension . . . was a valid exercise of self-regulation." *Id.* at 1266.

It was held that the rationale of the *Silver* decision was not applicable, for the exception to the per se rule announced in *Silver* had been based upon "another statute which justifies concerted action which would otherwise be a *per se* violation of Section 1 of the Sherman Act." *Id.* (footnote omitted). The court thus rejected the analysis which focuses on the "or otherwise" language of *Silver* as creating a more expansive exception to the per se rule when dealing with self-regulating rules of an association which have a noncommercial purpose. *See id.* at 1267. For a discussion of this analysis see note 148 *supra* and accompanying text.

It is interesting to note that the *Blalock* court impliedly accepted the rationale of the decisions in Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961) (discussed at note 175 *supra* and accompanying text), and Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (discussed at notes 237–39 *infra* and accompanying text), in which suspensions implemented by noncompetitors of the plaintiffs were held not to violate the antitrust laws. This acceptance leads to the conclusion that the requisite anticompetitive intent was found in *Blalock* because competitors of the plaintiff took part in the suspension decision.

[196] Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258 (N.D. Fla. 1976). In *Feminist Women's Health Center*, both plaintiff Center and defendant doctors provided abortion services. *Id.* at 1264. Plaintiff advertised while the defendants did not, *id.* at 1265, and charged less than half the amount charged by defendants, *id.* at 1264. Plaintiff alleged that defendants had joined in "a combination or conspiracy in the nature of a boycott," in that the defendants had discouraged other doctors from working at the center and from providing necessary back up services. *Id.* at 1262, 1265–67. Defendants alleged, among other things, that their actions were reasonable in

court determined that "if an economic boycott" were implemented "by members of the medical profession it is no less antithetical to free competition than is an economic boycott carried out by nonprofessionals."[197] In view, however, of the "professional context" and of the state regulation regarding the particular challenged activity, the court determined that a strict application of the per se rule was not appropriate.[198] The burden of proving a concerted refusal to deal was placed upon the plaintiff. The per se doctrine was deemed applicable insofar as the plaintiff would not be required to establish unreasonableness, anticompetitive intent, or public injury. Thus, it was held that if the plaintiff established a group boycott, it would be held per se unreasonable unless the defendants could prove that they acted in good faith.[199] In contrast to the application of the rule of reason, under which the plaintiff bears the burden of proving the challenged conduct unreasonable, the defendants, under this holding, bear the burden of proving that the challenged actions were motivated by legitimate considerations rather than "concern over the economic impact of competition."[200]

In the Sixth Circuit, as in other circuits, it has been held that the termination of a distributorship and the substitution of a new distributor does not give rise to an antitrust violation unless it causes an unreasonable restraint of trade.[201] The language in *Klor's*, which

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that they "were taken out of good faith concern for the public interest and for the sole purpose of maintaining medical standards." *Id.* at 1267–68.

[197] *Id.* at 1263.

[198] *Id.*

[199] *Id.* The court determined that the "good faith" defense should be evaluated by an objective standard. *Id.* at 1270.

[200] *Id.* at 1263, 1269–70.

[201] *See, e.g.*, Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 683, 686 (6th Cir. 1976); Ace Beer Distribs., Inc. v. Kohn, Inc., 318 F.2d 283, 286–87 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963); Roth Office Equip. Co. v. G F Business Equip. Co., 1975 Trade Cas. ¶ 60,563, at 67,469–70 (S.D. Ohio 1975). *See also* Champion Oil Serv. Co. v. Sinclair Refining Co., 502 F.2d 709, 712–15 (6th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975). In Beaute Craft Supply Co. v. Revlon, Inc., 402 F. Supp. 385, 387–88 (E.D. Mich. 1975), the court also approved this position, noting that if the termination resulted in a restraint of trade or constituted an attempt to monopolize, it would be declared illegal.

It is interesting to note A. P. Hopkins Corp. v. Studebaker Corp., 355 F. Supp. 816 (E.D. Mich. 1972), *aff'd*, 496 F.2d 969 (6th Cir. 1974), wherein the court was faced with a charge that the termination of plaintiff's distributorship by defendant was part of a scheme to put plaintiff out of business. 355 F. Supp. 819–20. It was determined that, even though the fact pattern in *Klor's* was distinguishable from the instant case since "only one manufacturer and its distributors [were] accused of conspiring," it was "clear that such a distinction [was] not pertinent in a case involving group boycotts." *Id.* at 821. The *Hopkins* court impliedly approved the decision in Ford Motor Co. v. Webster's

specifically excluded both a unilateral refusal to deal and an exclusive dealing agreement from invalidation, has been relied on as authority for this premise.[202] It also has been held that group boycotts implemented by groups with noncommercial objectives are not subject to the per se unreasonable rule.[203] This exception has been partially premised on the theory that the presence of coercive tactics and economic pressures has been the crucial element in causing concerted refusals to deal to be condemned as unreasonable per se.[204] Thus, it has been concluded that in a noncommercial setting where the so-called restraint has been imposed in furtherance of highly reasonable motives, the absence of these coercive economic elements should prevent the arrangement from being summarily invalidated.[205] Even in a commercial situation, the absence of coercive action has caused a district court in the Sixth Circuit to apply the rule of reason rather than the per se rule.[206]

Auto Sales, Inc., 361 F.2d 874, 880–83 (1st Cir. 1966) (discussed at note 167 *supra* and accompanying text), which held that a group boycott implemented by a vertical combination was per se unreasonable. *See* 355 F. Supp. at 821. The *Hopkins* court specifically held that the termination in and of itself was not an antitrust violation. *Id.* at 822. That holding, however, was based on the plaintiff's failure to establish sufficient facts supporting the conspiracy allegation. This failure caused the court to determine that the challenged action was "a simple refusal to deal between two traders." *Id.* at 822–29.

[202] *See* Ace Beer Distribs., Inc. v. Kohn, Inc., 318 F.2d 283, 287 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963).

[203] *See* United States v. United States Trotting Ass'n, 1960 Trade Cas. ¶ 69,761, at 76,955–56 (S.D. Ohio 1960). In this case, the Government charged that certain membership and eligibility rules of the defendant association constituted a group boycott and thus a per se violation of the Sherman Act. *Id.* at 76,955, 76,959–60. The purpose of the defendant association was to establish uniform rules and to promote the sport of harness racing, both of which the court found reasonable. *Id.* at 76,957–64. For a discussion of this case see Comment, *supra* note 138, at 1489–90.

[204] *See* United States v. United States Trotting Ass'n, 1960 Trade Cas. ¶ 69,761, at 76,955 (S.D. Ohio 1960). In drawing this conclusion, the court relied on the case of United States v. Insurance Bd., 144 F. Supp. 684, 698 (N.D. Ohio 1956), which had been decided before the Supreme Court rendered its decision in *Klor's*. 1960 Trade Cas. at 76,955. In *Trotting Association*, the court acknowledged the *Klor's* decision but held that it was distinguishable because it had dealt with a commercial refusal to deal. *Id.* at 76,955–56.

[205] *See* United States v. United States Trotting Ass'n, 1960 Trade Cas. ¶ 69,761, at 76,955–56, 76,958–59 (S.D. Ohio 1960). *See also* Nankin Hosp. v. Michigan Hosp. Serv., 361 F. Supp. 1199, 1207 (E.D. Mich. 1973); Roofire Alarm Co. v. Royal Indem. Co., 202 F. Supp. 166, 169 (E.D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963). For a discussion of *Roofire Alarm Co.* see Horsley, *supra* note 13, at 494–95.

[206] *See* United States v. Insurance Bd., 188 F. Supp. 949, 954–55 (N.D. Ohio 1960). In *Insurance Board* it was conceded that the effect of the defendant's rule was a group boycott. The controversy centered around whether to apply the rule of reason or the per se standard. *Id.* at 950. The court ruled that unless coercive action were apparent, the

The Sixth Circuit court of appeals has also declined to subject the challenged restraint to the per se approach in certain circumstances when the market entails a natural monopoly.[207] Instead, it has held that consideration of the purpose and effect of the combination is necessary to the determination of legality or illegality.[208]

In a commercial setting, it has been held by the Seventh Circuit court of appeals that compliance with certain association rules which resulted in a group boycott may not constitute a violation of the antitrust laws.[209] This holding was based upon the determination that the rules were reasonable and had been adopted for the purpose of protecting against destructive activities rather than having been adopted with the intention of destroying business.[210] The court stated that "an

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rule of reason must be applied. Applying the rule of reason, the court found the challenged rule to be an unreasonable restraint of trade. *Id.* at 955, 959. For a discussion of this case see Comment, *supra* note 138, at 1490–91; 1961 DUKE L.J. 606.

[207] Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506, 511, 513–15 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972). In *Lamb*, the plaintiff attempted to establish a community antenna television business. 461 F.2d at 509. The plaintiff alleged that there was a conspiracy to exclude it from the market, but the court found that the defendants did not have that purpose. *Id.* at 513. Furthermore, it was held that to apply the per se rule in a natural monopoly system such as this, where only one CATV operator could survive, would place major obstacles in the development of the market. *Id.* at 513–14.

[208] Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506, 515 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972).

[209] Florists' Nationwide Tel. Delivery Network—America's Phone-Order Florists, Inc. v. Florists' Tel. Delivery Ass'n, 371 F.2d 263, 267–70 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967).

[210] *Id.* In this case, the founder and the members of plaintiff Florists' Nationwide were also members of the long established Florists' Telegraph Delivery Association (FTD), the defendant in this action. Both organizations were involved in the service of filling intercity orders for flowers "—an order placed by a consumer in one city for the delivery of flowers in another city or community." 371 F.2d at 265–67. Plaintiff offered a franchise to one florist in each city, thus excluding some FTD members. *Id.* at 267. If the franchise was accepted, the plaintiff would publish the franchisee's name in a special directory which was supposed to represent the best florists in each city. All plaintiff's members would still continue to use the FTD service for the actual process of filling the flower orders. *Id.* In order to prevent the misuse of its service and the resultant boycott of some of its members, FTD adopted rules which in effect prohibited florists from being members in both organizations. *Id.* Plaintiff alleged that these rules violated the Sherman Act while defendant contended that they were a reasonable method necessary to protect itself against plaintiff's unfair practices and resultant boycott. *Id.* at 265, 267. At the trial level, a verdict had been rendered in favor of the plaintiff, but the circuit court remanded the case for a new trial based upon the trial court's failure to adequately instruct the jury of defendant's theory of defense. *Id.* at 266, 269–70.

In McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008 (S.D. Ill.), *aff'd mem.*, 506 F.2d 1404 (7th Cir. 1974), however, the defendant association attempted to classify its actions in suspending plaintiff from the association under the rule of reason by relying upon "the narrow exception to the *per se* rule set forth in *Silver*." 379

association of business firms has the right to enact reasonable regulations governing trade practices of its member-competitors," subject to being judged by the rule of reason.[211] Furthermore, it was noted that reliance upon the decisions in *Associated Press*, *Fashion Originators'*, and *Silver* was "misplaced," because "[t]he classes of restraints there involved were on their face unduly restrictive in relation to the particular industry."[212]

A district court in the Seventh Circuit has held that an examination of the motive and intent of the parties is important, since the crucial issue in a group boycott case "is not whether there was a refusal to deal or whether a refusal to deal was" effectuated by a combination.[213] Rather, the court viewed as critical the question of " 'whether the refusal to deal . . . is so anti-competitive in purpose or effect, or both, as to be an unreasonable restraint of trade.' "[214]

F. Supp. at 1018. The court discussed the argument, noting that if collective action resulting from self-regulation " 'is required by the industry structure, it falls within the "or otherwise" provision of *Silver*' " if its purpose is to accomplish a goal in accordance " 'with the policy justifying self-regulation, . . . is reasonably related to that goal, . . . is no more extensive than necessary,' " and provision is made for procedural safeguards in the implementation of the policy. *Id.* (quoting from Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1064–65 (C.D. Cal.), *issuance of injunction aff'd sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971)). The court rejected defendant's argument because of the absence of procedural safeguards afforded to the plaintiff. 379 F. Supp. at 1018. *Cf.* United States Dental Institute v. American Ass'n of Orthodontists, 396 F. Supp. 565, 580–81 (N.D. Ill. 1975).

[211] Florists' Nationwide Tel. Delivery Network—America's Phone-Order Florists, Inc. v. Florists' Tel. Delivery Ass'n, 371 F.2d 263, 268–69 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967).

[212] *Id.* The court viewed *Silver* as condemning a total "ban on dealings with an outsider," *Associated Press* as holding invalid a rule which allowed a member to veto another newspaper's membership application, and *Fashion Originators'* as involving a wide combination whose "purpose and practice . . . ran counter to the public policy declared in the Sherman and Clayton Acts." *Id.* It is interesting to note, however, that the defensive rationale rejected by the Supreme Court in *Fashion Originators'* was very similar to that accepted by the *Florists' Nationwide* court. *Compare id. with* 312 U.S. at 467–68.

[213] America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 333 (N.D. Ind. 1972). In *America's Best Cinema*, plaintiffs challenged the defendants' policy of rejecting all advertising for X-rated films. *Id.* at 330–31. The court determined that the defendants had not stopped dealing with plaintiffs completely and that there was no showing of anticompetitive motives. It was thus concluded that the policy was not an unreasonable restraint of trade. *Id.* at 333–34. For a brief synopsis of *America's Best Cinema* see Mayne, *supra* note 188, at 783–84.

[214] America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 333 (N.D. Ind. 1972) (quoting from Alpha Distrib. Co. v. Jack Daniel Distillery, Inc., 454 F.2d 442, 452 (9th Cir. 1972), *cert. denied*, 419 U.S. 842 (1974)). *But see* Moraine Prods. v. ICI America, Inc., 538 F.2d 134, 144 (7th Cir.), *cert. denied*, 45 U.S.L.W. 3345 (U.S. Nov. 9, 1976).

Additionally, a court in the Seventh Circuit has approved as "well settled" the substitution of one distributor for another as being a reasonable restraint of trade.[215] This principle has also been the basis for a decision by a court in the Eight Circuit which cautioned that, although the termination/substitution is not a per se violation, it could be held invalid if "it was . . . done in response to some forbidden anticompetitive or monopolistic objective."[216]

Another court in the Eighth Circuit has noted that the allegedly simplistic application of the per se rule to group boycotts has been eroded.[217] The court indicated that there was a distinction between "true boycotts" and those situations which appear to be group boycotts but which are in reality "simply the inevitable result of legitimate business decisions."[218] True boycotts were defined as "concerted refusals to deal" implemented with the use of coercive means in order to enforce compliance with a desired policy "or with the purpose or effect of excluding a competitor of a group member from competition."[219] In denying a request for a preliminary injunction, the court found that there were no allegations of coercive intent or effect, or of a destructive purpose directed toward a competitor of one of the members of the combination. Furthermore, there was no claim that the unavoidable result of the challenged conduct would be to destroy such a competitor.[220] The court thus distinguished the case under review from the Supreme Court cases which had found chal-

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[215] *See* E. A. Weinel Constr. Co. v. Mueller Co., 289 F. Supp. 293, 297–99 (E.D. Ill. 1968). In this case it was held that the plaintiff's reclassification from distributor to contractor by the defendant supplier was not an antitrust violation. The termination had taken place after complaints from the defendant distributor had resulted in plaintiff having to pay the higher contractor prices. *Id.* at 295, 297, 299–300. *See also* Continental Distrib. Co. v. Somerset Importers, Ltd., 411 F. Supp. 754, 756–58 (N.D. Ill. 1976), in which the court granted a preliminary injunction prohibiting the termination of three distributorships pending a trial at which an inquiry into anticompetitive effect and motive would be important.

[216] Western Wholesale Liquor Co. v. Gibson Wine Co., 372 F. Supp. 802, 806–07 (D.S.D. 1974).

[217] Media Networks, Inc. v. American Tel. & Tel. Co., 1976 Trade Cas. ¶ 60,780, at 68,383–84 (D. Minn. Jan. 27, 1976).

[218] *Id.*

[219] *Id.*

[220] *Id.* at 68,384–85. In *Media Networks*, the plaintiff was engaged in the business of supplying advertising services. *Id.* at 68,381. The service was utilized by some of A.T. & T.'s subsidiaries until a Council composed of representatives from A.T. & T. and some of its subsidiaries determined that the placement of all local advertisements in national magazines, the service that plaintiff provided, should be discontinued. *Id.* Plaintiff contended that this resulted in a group boycott, a per se violation of section 1 of the Sherman Act, while defendant alleged that the policy was necessary to avoid duplicative business expenditures. *Id.* at 68,381–82.

lenged actions to be per se unreasonable.[221] The plaintiff had conceded that an "automatic application of a *per se* rule" was not necessarily appropriate but contended that defendant could only avoid the application of the per se rule by establishing that its conduct, in formulating the policy alleged to be a group boycott, " 'was "necessary and ancillary" to a valid business arrangement or agreement among the companies.' "[222] The court declined to accept either party's theory but "note[d] that they are more similar than dissimilar, in that both recognize the unworkability of a blanket *per se* rule in all 'refusal to deal' cases."[223]

When determining whether to apply the per se label to a concerted refusal to deal, the Eighth Circuit court of appeals has also focused on the purpose and effect of the arrangement. The Eighth Circuit followed the reasoning propounded by the Fifth Circuit court of appeals that group boycotts which have been struck down by the application of the per se rule can generally be classified into three basic categories, all involving some type of anticompetitive intent or purpose.[224] Thus, the Eighth Circuit has refused to automatically

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[221] *Id.* at 68,384. In giving examples of cases involving coercion, the court cited one of its previous decisions, Mackey v. National Football League, 407 F. Supp. 1000 (D. Minn. 1975). 1976 Trade Cas. at 68,384. In *Mackey*, the plaintiffs, who were professional football players, brought an action against the National Football League alleging that the "Rozelle Rule" constituted a per se violation of the Sherman Act. 407 F. Supp. at 1002. The operation of the Rozelle Rule restricts the players in their opportunities and makes their bargaining power less effective. *Id.* at 1005–07. The court held that the Rozelle Rule constituted a group boycott and therefore was per se unreasonable. Furthermore, the "Rule" was held unreasonable under the rule-of-reason analysis. *Id.* at 1007–08. *See also* Bowman v. National Football League, 402 F. Supp. 754 (D. Minn. 1975). For discussions criticizing the per se approach of the trial court in *Mackey* see Note, *The Legality of the Rozelle Rule and Related Practices in the National Football League*, 4 FORDHAM URB. L.J. 581 (1976); Note, *Illegal Procedure—The Rozelle Rule Violates the Sherman Antitrust Act*, 59 MARQ. L. REV. 632 (1976).

On appeal, the Eighth Circuit determined that "the unique nature of the business of professional football renders it inappropriate to mechanically apply *per se* illegality rules." Mackey v. National Football League, 1976 Trade Cas. ¶ 61,119, at 70,073–74 (8th Cir. Oct. 18, 1976). Viewing the Rozelle Rule under the rule of reason, the court of appeals affirmed, however, the trial court's finding that the Rozelle Rule was unreasonable and thus violative of section 1 of the Sherman Act. *Id.* at 70,076.

[222] Media Networks, Inc. v. American Tel. & Tel. Co., 1976 Trade Cas. ¶ 60,780, at 68,384–85 (D. Minn. Jan. 27, 1976).

[223] *Id.* at 68,385.

[224] Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119, 124–25 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974). In *Worthen*, the plaintiff bank contended that a by-law of the defendant credit card company was a group boycott, and, as such, per se violative of section 1 of the Sherman Act. The by-law prevented a bank, authorized to issue credit cards and extend credit within defendant's credit card system, from becoming a member of the only other national bank credit card system, Inter-

apply the per se label because "[t]he term 'group boycott' . . . is in reality a very broad label for divergent types of concerted activity."[225] To prohibit certain types of commercial activity simply by labeling it a group boycott and applying the per se rule was seen as inviting "the chance that certain types of reasonable concerted activity will be proscribed."[226]

Although the Ninth Circuit court of appeals has also held certain group boycott arrangements invalid by application of the per se unreasonable rule,[227] courts in that circuit have rendered decisions in some of the leading cases holding concerted refusals to deal subject to the "rule of reason" analysis. For instance, in one landmark case, the Ninth Circuit court of appeals held that it was not a per se violation of section 1 of the Sherman Act for two suppliers who used the same distributor to agree to stop dealing with that distributor and engage another distributor who was also a party to the agreement, specifically finding "the existence of a horizontal agreement . . . not

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bank/Master Charge. 485 F.2d 120–23. For a discussion of the *Worthen* case see Note, 27 ARK. L. REV. 722 (1973). For a discussion of the Fifth Circuit case which was relied upon by the *Worthen* court see notes 187–95 *supra* and accompanying text.

[225] Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119, 124–25 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

[226] *Id.* In response to the plaintiff's argument that the trial court had been correct in applying the per se label to the challenged by-law, the court viewed such cases as *Fashion Originators'*, *Eastern States*, and *Klor's* as not controlling. This determination was based upon the view that in those cases "there was a lack of an economic justification, in terms of the need to join together to produce the product being sold," while in the instant case, an economic justification was found in that the banks could not individually issue and service a national credit card. 485 F.2d at 126–27. The court also viewed *Associated Press* as inapposite in that the invalidation of AP's membership restrictions was seen as arising from the fact that AP's by-laws enabled its members to veto the membership of their competitors, while the National BankAmericard system allowed competing banks to become members. The challenged restrictions were perceived as being more similar to the one not invalidated in *Associated Press*—the restriction prohibiting members from selling local news to non-members. *Id.* at 128. The *Worthen* court thus concluded that "*Associated Press* does not mandate the application of the per se principle in this case." *Id.* at 129. The summary judgment which had been granted to plaintiffs based upon the application of the per se rule was reversed, and the case was remanded for trial in order to determine the reasonableness of the restraint. *Id.* at 124, 129–30.

[227] *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1002 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (the court specifically held, however, that it was not necessary to "explore the outer limits of the doctrine that joint refusals to deal" are per se unreasonable, "for the conduct involved here was of the kind long held to be forbidden without more"); Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 284 F.2d 1, 16–17 (9th Cir. 1960), *modified*, 289 F.2d 933 (9th Cir. 1961), *rev'd on other grounds*, 370 U.S. 19 (1962). For a brief review of the *Hilton Hotels* case see Mayne, *supra* note 188, at 782.

dispositive."[228] This holding could be considered an expansion of the cases which have held that the termination and substitution of a distributorship is not a per se violation of the antitrust laws, as most of those cases involved a vertical relationship rather than a vertical-horizontal one.[229]

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[228] Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 75–76, 80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). In *Seagram*, plaintiff Hawaiian Oke was a wholesale distributor of certain Seagram products and also of some Barton products. When both of these manufacturers terminated their distributorship arrangements with plaintiff and engaged McKesson, plaintiff brought an action alleging that this conduct was a group boycott and therefore a per se violation of section 1 of the Sherman Act. 416 F.2d at 73–74. Although the court found no evidence supporting the allegations that the two manufacturers had combined in their decision to change distributors, the court assumed that such an agreement did exist for the purposes of its discussion. *Id.* at 74–75. For a discussion of the *Seagram* case see 42 U. COLO. L. REV. 467 (1971).

In the earlier decision of Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 6–7 (9th Cir. 1963), the plaintiff, a terminated distributor, alleged that its supplier and some of the supplier's other distributors had conspired to prevent plaintiff from dealing in competitive products in order to exclude these products from the market. Holding that the allegations stated a claim upon which relief could be granted, the court found no difference between a combination of a number of manufacturers and one distributor, as was condemned in *Klor's*, and a combination between one manufacturer and a number of distributors. *Id.* at 7. Although recognizing that *Klor's* involved the application of the per se rule and noting that it knew of no decision holding an exclusive distributorship contract subject to the per se rule, the court stated that

> [i]t may be, however, that such contracts, particularly when there is a "horizontal" understanding among the distributors as well as a "vertical" one between the manufacturer and each distributor, can be so anti-competitive, in purpose or effect, or both, as to be an unreasonable restraint of trade. Neither we nor the trial court can know, at this stage, whether that is so as a matter of law.

Id. Later in the opinion, however, the court stated that it was not holding that the conspiracy as alleged was illegal per se, but only that it might constitute an unreasonable restraint of trade. *Id.* at 8. Eventually it was held that the allegations of conspiracy were insufficient to support a section 1 violation. Walker Distrib. Co. v. Lucky Lager Brewing Co., 362 F.2d 1008, 1009 (9th Cir.), *cert. denied*, 385 U.S. 976 (1966).

[229] For cases in the Ninth Circuit stating that it is not a per se violation of the Sherman Act for a supplier to agree with a distributor to engage his services and to terminate business dealings with the supplier's present distributor see Dreibus v. Wilson, 529 F.2d 170, 172 (9th Cir. 1975); Alpha Distrib. Co. v. Jack Daniel Distillery, Inc., 454 F.2d 442, 452 (9th Cir. 1972), *cert. denied*, 419 U.S. 842 (1974); Cartrade, Inc. v. Ford Dealers Advertising Ass'n, 446 F.2d 289, 292–94 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972); Ricchetti v. Meister Brau, Inc., 431 F.2d 1211, 1214–15 (9th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); Scanlan v. Anheuser-Busch, Inc., 388 F.2d 918, 920–21 (9th Cir.), *cert. denied*, 391 U.S. 916 (1968); Kirihara v. Bendix Corp., 306 F. Supp. 72, 79 (D. Hawaii 1969). For a discussion of *Cartrade* and *Alpha Distributing* see Burris & Mayne, *supra* note 175, at 691–92, 697–98.

Even though such an arrangement is not a per se violation of the antitrust laws, if the requisite motive and intent are established the court will strike down the conduct under the rule-of-reason analysis as an unreasonable restraint of trade. *See, e.g.*, Pacific

The court based its conclusion on the premise that, in cases applying the per se rule, there existed either an exclusionary purpose directed toward the object of the combination or an anticompetitive motive.[230] The court found the facts before it devoid of such a purpose or motive and thus found no violation of the antitrust laws.[231] Although the court found the arrangement not subject to the per se rule, it noted that it was possible for such an arrangement to be so anticompetitively motivated or to so adversely affect competition as to constitute an unreasonable restraint of trade under the "rule of reason" analysis.[232]

In drawing the line between per se illegal group boycotts and group boycotts subject to the rule of reason, the court relied on an article written before the Supreme Court had explicitly held con-

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Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1202–03 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1741 (1976); Ford Wholesale Co. v. Fibreboard Paper Prods. Corp., 319 F. Supp. 612, 614–15 (N.D. Cal. 1970).

In the following cases it was held that the substitution of a direct sales force for the independent distributor was not an unreasonable restraint of trade: Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045, 1050–51 (9th Cir. 1974); Bushie v. Stenocord Corp., 460 F.2d 116, 119–20 (9th Cir. 1972); Knutson v. Daily Review, Inc., 383 F. Supp. 1346, 1357–67 (N.D. Cal. 1974), *modified*, 401 F. Supp. 1374 (N.D. Cal. 1975). *But see* Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1342–43 (9th Cir. 1970) (manufacturer alleged to have monopoly power and to have used unfair practices). For a discussion of *Bushie v. Stenocord Corp.* see Burris & Mayne, *supra* note 175, at 690–91.

[230] Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76–77 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). It has been commented that the facts of the *Seagram* case actually were very similar to those of the *Klor's* case and that the other cases cited and distinguished by the court as involving anticompetitive purpose should not have been relied upon, as they were decided before *Klor's*. 42 U. COLO. L. REV. 467, 469–70 (1971). Although conceding that the price aspect of the case had not been relied on by the Supreme Court in its decision in *Klor's*, the *Seagram* court avoided coming to terms with the *Klor's* decision by stating that the defendants' purpose in *Klor's* was to force the plaintiff out of business and that the reason behind such conduct was that plaintiff had cut prices. 416 F.2d at 77. It is interesting to note that the *Seagram* court seemed to suggest that the exclusion of discount dealers or price-cutters from the market was a pertinent fact to the *General Motors* decision. *See id.* at 76. Yet, the Supreme Court, in the *General Motors* decision, although noting the effect of the arrangement upon prices, specifically pointed out the boycott cases which had not involved price fixing. United States v. General Motors Corp., 384 U.S. 127, 146 (1966). Another author has stated that the *Seagram* decision is justified by the "ancillary restraint doctrine," which operates to protect an unlawful activity if it is merely ancillary to lawful conduct. Lipson, *The Legality of Refusals to Deal*, 21 PRAC. LAW. 77, 81 (April 15, 1975).

[231] Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 78, 80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[232] Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 75–76, 78–79 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

certed refusals to deal to be per se unreasonable.[233] In this article, the author stressed the distinction between coercive concerted refusals to deal and arrangements whereby parties subject themselves to mutually limiting restrictions, which only indirectly affect third parties, in order to facilitate their own business interest. The author concluded that, in the latter situation, the primary concern should be an examination of the purpose and effect of the restrictions.[234]

In a later case the Ninth Circuit court of appeals extended this rationale to include conduct which more closely resembled a concerted refusal to deal than the termination and substitution of a distributor.[235] Finding no evidence of anticompetitive purpose or motive and declining to establish "a harsh precedent" by "automatically appl[ying] the group boycott *per se* rule," the court determined that the conduct of the defendant association was reasonable in that it was prompted by a desire to promote legitimate association activities and that any effect upon competition or third parties was indirect.[236]

In another decision by the Ninth Circuit, the court reviewed the eligibility rules of a professional athletic association by reference to the "rule of reason" standard.[237] Concluding that the association was entitled to adopt reasonable rules, the court held that the rules were

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[233] Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76–78, 80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[234] *See* Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 876–77 (1955). For a discussion of this article see note 160 *supra*.

[235] Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365, 1369 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971). In *Bridge Corp.*, the plaintiff had developed a portable digital computer for use in scoring bridge tournaments. 428 F.2d at 1366. The defendant association had refused to allow the plaintiff to demonstrate the system at a bridge tournament, stating that it would not sanction the tournament if the computer were used. Plaintiff argued that this refusal by the association, which controlled organized bridge tournaments and was the only organization which awarded master points, was a group boycott, per se violative of section 1 of the Sherman Act. *Id.* at 1366–69.

[236] Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365, 1369–71 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971). *Accord*, Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n, 405 F. Supp. 99, 107–12 (D. Hawaii 1975). In *Bridge Corp.*, the court found that the primary motive behind the conduct of the League was to maintain "the integrity of the master point system." 428 F.2d at 1370. Furthermore, it was determined that the manner in which the League maintained this integrity was reasonable, as the conditions placed upon the approval of the new scoring method were reasonable. *Id.*

[237] *See* Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165, 170–71 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966). Plaintiff, a professional golfer, alleged that the defendant golfers' association had conspired in violation of the Sherman Act by the implementation of its eligibility rules. 358 F.2d at 166. Deesen had been an approved tournament player, but lost that status by failing to satisfy the playing ability standards. *Id.* at 167–68. Although Deesen could have regained his eligibility by becoming a golf

adopted for the purpose of fostering rather than suppressing competition.[238] Furthermore, it was found that both the rules and their application were reasonable.[239] In another case involving association

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professional or an assistant golf professional at a golf club, he refused to become so employed. *Id.* at 167.

[238] Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165, 170–72 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966). For a discussion of this case see Comment, *supra* note 138, at 1495–96.

[239] Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165, 170–72 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966). Although it could be argued that the *Deesen* decision was partially based on the absence of commercial purpose in the adoption and implementation of the rules of the association, the same court, in Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 376 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966), had already rejected the noncommercial purpose theory as a defense to a group boycott charge. In *Washington State Bowling*, the plaintiff alleged that the named conspirators had enforced tournament eligibility rules which denied a bowler eligibility if he had taken part in any organized bowling in an establishment that was not a member of certain associations. 356 F.2d at 374. It was contended that the effect of these rules was to suppress competition and to create a group boycott directed against non-member bowling establishments. *Id.* The defendants argued that the instruction given by the trial court that the rule constituted a group boycott and was therefore a per se violation of the antitrust laws, was improper in that the per se rule was applicable only to commercial boycotts. *Id.* at 375. The court rejected this premise, determining that it had been

> refuted by language of recent decisions of the Supreme Court . . . in cases which held refusals of manufacturers or dealers to deal with customers to be per se violations of the Sherman Act.

Id. at 376. For a discussion of the *Washington* case see Anderson, *The Sherman Act and Professional Sports Associations' Use of Eligibility Rules*, 47 NEB. L. REV. 82, 88–89 (1968); Comment, *supra* note 138, at 1496–97.

In Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1064–66 (C.D. Cal.), *issuance of injunction aff'd sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971), a district court attempted to harmonize these decisions. In a summary judgment action, the plaintiff challenged, as a group boycott, the eligibility rules of the National Basketball Association which, in effect, do not allow players to become eligible for the draft until four years after high school graduation. 325 F. Supp. at 1059–61. The court recognized that Supreme Court holdings seemed to indicate that group boycotts cannot be justified in any circumstances but that many lower courts found ways to avoid such a holding. *Id.* at 1064. It was noted that "[t]he possibility that all concerted refusals to deal were not *per se* illegal was given considerable impetus in [*Silver*]." *Id.* The court discussed the argument which propounds the premise that the *Silver* decision appears to carve out an exception to the per se rule when (1) there is a legislative mandate or industry need for self-regulation, (2) the regulation is directed toward a reasonable goal, reasonably related to that goal, and no broader than necessary, and (3) provision is made for procedural safeguards. *Id.* at 1064–65. The court determined that the *Silver* Court had "focused" upon the requirement of notice and a hearing "as a check on illegitimate self-regulation." *Id.* at 1065. This "check" was found to be the explanation for the facial inconsistencies between the decisions in *Deesen* and *Washington State*. *Id.* The rules upheld in *Deesen* were seen as being necessary to the industry structure, reasonably related to their goal, and subject to procedural safeguards, while the rules in *Washington State* were viewed as lacking procedural safeguards. *Id.* Based upon this analysis, the court found that the basketball eligibility rules exhibited a

rules, it has been propounded by a court in the Ninth Circuit that an exception to the per se unreasonable rule can be found in the rationale of the *Silver* decision regarding self-regulation made necessary by market structure, if it is reasonable in purpose, not overly broad in application, reasonably related to its purpose, and accompanied by procedural safeguards.[240]

As in other circuits, courts in the Tenth Circuit have stated that group boycotts are per se violations of section 1 of the Sherman Act.[241] Yet, the Tenth Circuit court of appeals has followed the other circuits in holding that one may agree with a new distributor to engage his services and terminate dealings with the present distributor without violating the antitrust laws.[242]

CATEGORICAL ANALYSIS OF THE CIRCUIT COURT DECISIONS

The legal analyses employed by the courts in the various circuits in avoiding the application of the per se rule to group boycotts exhibit trends which are conducive to definitive categorization. The termination of a distributorship is the arrangement most consistently held not subject to the application of the per se rule. The typical fact pattern involves a manufacturer who agrees with a prospective distributor to terminate its present distributor in order to engage the services of the new distributor. When the agreement has been consummated, the terminated distributor challenges the arrangement by

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total absence of procedural safeguards and were, therefore, subject to the application of the per se unreasonable rule. *Id.* at 1066–67.

In the later decision of Kapp v. National Football League, 390 F. Supp. 73, 81–82 (N.D. Cal. 1974), the court, ignoring the *Denver Rockets* analysis, appeared to hold that a rule of reason analysis was the proper one to apply to professional athletic league rules because of the unique nature of the industry. For a discussion of the *Kapp* case see Note, *The Legality of the Rozelle Rule and Related Practices in the National Football League*, 4 FORDHAM URB. L.J. 581 (1976); Note, *The True Story of What Happens When the Big Kids Say, "It's my football, and you'll either play by my rules or you won't play at all."*, 55 NEB. L. REV. 335 (1976).

[240] *See* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1064–66 (C.D. Cal.), *issuance of injunction aff'd sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971). For a discussion of this case see note 239 *supra*; 10 SAN DIEGO L. REV. 413 (1973).

[241] Baum v. Gillman, 1976 Trade Cas. ¶ 60,745, at 68,192 (D. Utah Feb. 17, 1976).

[242] Anaya v. Las Cruces Sun News, 455 F.2d 670, 672 (10th Cir. 1972). *See also* Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637, 640 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973). In Adolph Coors Co. v. FTC, 497 F.2d 1178, 1188 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), the court, however, specifically noted that although distributors may be terminated "according to the contract provisions which the distributors have agreed to," such "contract termination provisions" may not be employed "to force . . . distributors into anticompetitive behavior." For a brief review of *Anaya* see Burris & Mayne, *supra* note 175, at 696.

alleging that it constitutes a contract or conspiracy which has resulted in a refusal to deal.[243] Occasionally, the court will find that the termination was a unilateral decision of the manufacturer and thus not subject to prohibition under section 1 of the Sherman Act.[244] Yet, even if the termination and substitution has been effectuated as a result of an agreement with the new distributor, the courts have consistently stated that it is not a concerted refusal to deal subject to the per se rule.[245]

It is important to remember that even though this arrangement has not been subjected to the per se rule, it is still subject to being judged by the application of the rule of reason. Thus, if anticompetitive motive or effect is established, the court will deem it to be an unreasonable restraint of trade.[246] It is crucial to the analysis of this type of concerted refusal to deal to realize that the form of the combination in such a situation is generally a vertical arrangement.[247] The Supreme Court has noted that a vertical combination is subject to different considerations—at least outside the price-fixing area

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[243] *See, e.g.*, Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972); V. & L. Cicione, Inc. v. C. Schmidt & Sons, 403 F. Supp. 643, 648 (E.D. Pa. 1975); Western Wholesale Liquor Co. v. Gibson Wine Co., 372 F. Supp. 802, 803 (D.S.D. 1974); Potter's Photographic Applications Co. v. Ealing Corp., 292 F. Supp. 92, 95–96 (E.D.N.Y. 1968).

[244] *See, e.g.*, Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 396 (5th Cir. 1976); Weather Wise Co. v. Aeroquip Corp., 468 F.2d 716, 718 (5th Cir. 1972), *cert. denied*, 410 U.S. 990 (1973); Apolo Business Machines, Inc. v. Compucorp, 1976 Trade Cas. ¶ 61,015, at 69,477 (N.D. Ala. Mar. 29, 1976).

[245] *See, e.g.*, Dreibus v. Wilson, 529 F.2d 170, 172 (9th Cir. 1975); Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1667 (1976); Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1248–49 (5th Cir. 1975); Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972); Ace Beer Distribs., Inc. v. Kohn, Inc., 318 F.2d 283, 285–87 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963); Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568, 575 (D. Md. 1975); Western Wholesale Liquor Co. v. Gibson Wine Co., 372 F. Supp. 802, 806–07 (D.S.D. 1974); E. A. Weinel Constr. Co. v. Mueller Co., 289 F. Supp. 293, 298 (E.D. Ill. 1968). For an interesting discussion of the legality of franchise terminations under section 1 of the Sherman Act see Bohling, *supra* note 125, at 1209–23.

[246] *See, e.g.*, Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1202–03 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1741 (1976); Ford Wholesale Co. v. Fibreboard Paper Prods. Corp., 319 F. Supp. 612, 614–15 (N.D. Cal. 1970).

[247] *See, e.g.*, Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972); Western Wholesale Liquor Co. v. Gibson Wine Co., 372 F. Supp. 802, 803 (D.S.D. 1974); Potter's Photographic Applications Co. v. Ealing Corp., 292 F. Supp. 92, 95–96 (E.D.N.Y. 1968). It is interesting to note that two cases which found a vertical boycott arrangement subject to the per se rule did not involve a termination-of-distributorship situation. *See* Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc., 365 F.2d 478, 484–85 (5th Cir. 1966); Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 876–83 (1st Cir. 1966).

—than an arrangement that is essentially horizontal in nature.[248] In this context, the application of the rule of reason does not appear to contravene the principles articulated by the Supreme Court, since this termination/substitution process is an implicit result of an exclusive dealing agreement which the Supreme Court has approved in dictum.[249]

Occasionally, the termination of a distributorship involves a combination which is more complex than a simple vertical agreement. Some courts have recognized that when the combination is in the nature of a horizontal-vertical conspiracy, it may be subject to the per se rule under the precedential authority of *Klor's* or *General Motors*.[250] Other courts have focused on the absence of anticompetitive intent or motive in finding the restraint subject to the rule of reason.[251] This focus on the lack of anticompetitive motive has been employed in a variety of fact patterns in order to judge the restraint under the rule of reason and has been relied upon by courts in almost all of the circuits.[252]

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[248] *See* White Motor Co. v. United States, 372 U.S. 253, 260–61, 263 (1963). *See generally* Potter's Photographic Applications Co. v. Ealing Corp., 292 F. Supp. 92, 103–04 (E.D.N.Y. 1968); Arzee Supply Corp. v. Ruberoid Co., 222 F. Supp. 237, 241 (D. Conn. 1963).

[249] In United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967), the Court approved franchise agreements when other equivalent products are available if "the restraint stops at that point . . . [and] nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers." In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959), the Court specifically noted that the arrangement was not simply an exclusive dealing agreement between a manufacturer and a distributor. For cases relying on the dictum in *Schwinn* or *Klor's* see Ricchetti v. Meister Brau, Inc., 431 F.2d 1211, 1214 (9th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); Ace Beer Distribs., Inc. v. Kohn, Inc., 318 F.2d 283, 287 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963); Bay City-Abrahams Bros. v. Estee Lauder, Inc., 375 F. Supp. 1206, 1214–15 (S.D.N.Y. 1974); Western Wholesale Liquor Co. v. Gibson Wine Co., 372 F. Supp. 802, 804–05 (D.S.D. 1974); Potter's Photographic Applications Co. v. Ealing Corp., 292 F. Supp. 92, 104 (E.D.N.Y. 1968).

For cases stating that an exclusive distributorship arrangement is not subject to the per se rule see Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 144–47 (6th Cir. 1972); Thomas v. Amerada Hess Corp., 393 F. Supp. 58, 70–71 (M.D. Pa. 1975); Top-All Varieties, Inc. v. Hallmark Cards, Inc., 301 F. Supp. 703, 704 (S.D.N.Y. 1969). For a discussion of exclusive distributorship arrangements see note 128 *supra*.

[250] *See, e.g.*, Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 364 F.2d 957, 968 (5th Cir. 1966); A. P. Hopkins Corp. v. Studebaker Corp., 355 F. Supp. 816, 820–22 (E.D. Mich. 1972), *aff'd*, 496 F.2d 969 (6th Cir. 1974). *See also* Fleischmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221, 228 (S.D.N.Y. 1975).

[251] *See* Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76–78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Instant Delivery Corp. v. City Stores Co., 284 F. Supp. 941, 947–48 (E.D. Pa. 1968).

[252] *See, e.g.*, International Rys. of Central America v. United Brands Co., 532 F.2d

The courts that rely on the lack of anticompetitive motive or effect reason that the cases in which the Supreme Court has applied the per se rule to group boycotts have exemplified restraints which were clearly imposed for anticompetitive reasons. It is then concluded that if the motive or effect is not obviously anticompetitive, it should not be summarily held illegal.[253] Because this analysis has been applied to a wide variety of factual patterns, it is difficult to draw a composite picture of the typical situation to which the reasoning is applied. Generally, the application is result-oriented. The evils of the particular arrangement may not be apparent, and a declaration of invalidity would appear to be more detrimental to active competition than the existence of the challenged restraint.

In an attempt to compartmentalize the various applications of this analysis, it can be generalized that occasionally the party objecting to the arrangement has not been entirely excluded from the market but only restricted in some reasonable way, or that the refusal to deal was not absolute but, rather, was conditioned in some not totally unreasonable manner.[254] Often the alleged object of the boycott is not a competitor of the members of the combination and has been only indirectly affected by the implementation of a trade or association policy. It is primarily in this area that the lack of anticompetitive motive analysis may overlap with the noncommercial purpose theory

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231, 240–41 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3251 (U.S. Oct. 4, 1976); De Filippo v. Ford Motor Co., 516 F.2d 1313, 1317–18 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975); Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 124–25 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186–88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76–78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303–04 (D. Mass. 1975); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 333 (N.D. Ind. 1972); United States v. Insurance Bd., 188 F. Supp. 949, 954–55 (N.D. Ohio 1960).

[253] *See, e.g.*, De Filippo v. Ford Motor Co., 516 F.2d 1313, 1317–18 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975); Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 124–25 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186–87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

[254] *See, e.g.*, De Filippo v. Ford Motor Co., 516 F.2d 1313, 1315–16 (3d Cir.), *cert. denied*, 423 U.S. 912 (1975); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 333–34 (N.D. Ind. 1972). In *De Filippo*, it was specifically noted that plaintiffs were not entirely deprived of a chance to be a Ford dealer but were deprived only of a contract containing special advantageous terms. 516 F.2d at 1320–21. The court in *America's Best Cinema* stated that the defendants' policy did not result in a refusal to deal with plaintiffs entirely but only restricted the content of the material plaintiffs could include in advertising placed in defendants' newspapers. 347 F. Supp. at 333.

and the valid exercise of self-regulation exception. It is not unusual for a court to rely on any combination of these three premises in order to invoke the "rule of reason" standard.[255] For example, a court may reject the noncommercial purpose theory as an exception to the application of the per se rule, but may avoid its utilization in a noncommercial setting by finding the presence of a reasonable association rule or regulation.[256]

Although one court has specifically rejected the argument that the contested arrangement is not subject to the per se rule if the primary purpose of the arrangement is noncommercially directed,[257] such an argument has been relied upon by courts in four circuits.[258] Generally, the courts rely on the discussion of the Supreme Court in *Apex Hosiery Co. v. Leader*,[259] in which the Court declared that the antitrust laws were meant to regulate the commercial business community.[260] The cases usually involve nonprofit college or athletic associations.[261] In most instances, the party protesting the restraint is not a competitor but is a member of the association or subject to association regulation.[262] If the association rule or its implementation

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[255] *See, e.g.*, Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303–04 (D. Mass. 1975) (noncommercial purpose and absence of anticompetitive motive); College Athletic Placement Serv., Inc. v. National Collegiate Athletic Ass'n, 1975 Trade Cas. ¶ 60,117, at 65,265–67 (D.N.J.), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974) (noncommercial purpose and absence of anticompetitive motive); United States v. United States Trotting Ass'n, 1960 Trade Cas. ¶ 69,761, at 76,955–56 (S.D. Ohio 1960) (noncommercial purpose and absence of coercive action).

[256] *See* note 239 *supra*.

[257] *See* Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 375–76 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966).

[258] *See* Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650, 652–55 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303–04 (D. Mass. 1975); College Athletic Placement Serv., Inc. v. National Collegiate Athletic Ass'n, 1975 Trade Cas. ¶ 60,117, at 65,266–67 (D.N.J.), *aff'd mem.*, 506 F.2d 1050 (3d Cir. 1974); United States v. United States Trotting Ass'n, 1960 Trade Cas. ¶ 69,761, at 76,955–56 (S.D. Ohio 1960).

[259] 310 U.S. 469 (1940).

[260] *Id.* at 490–501. The purpose of the Sherman Act was seen as "the prevention of restraints to free competition in business and commercial transactions." *Id.* at 493. The Court stated that generally "some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act." *Id.* at 500.

[261] *See* cases cited note 258 *supra*.

[262] *See, e.g.*, Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650, 652–53 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 296–98 (D. Mass. 1975); United States v. United States Trotting Ass'n, 1960 Trade Cas. ¶ 69,761, at 76,957 (S.D. Ohio 1960).

is viewed as having no commercial purposes, is reasonable, and has only an incidentally restraining effect upon the party objecting to it, the arrangement will be upheld.[263] Of course, if the effect of the rule significantly infringes upon the freedom to deal competitively in the market it will be held invalid, even though the rule itself was imposed for noncommercial purposes.[264]

Another exception to the per se rule is sometimes said to have been gleaned from the language employed by the Court in *Silver*. Although this exception has been specifically rejected by one court,[265] it has been recognized that the *Silver* language can be interpreted to mean that, in the absence of anticompetitive intent which would cause the regulation to run afoul of the rule of reason, a valid and reasonable exercise of self-regulation which is reasonably related to a valid purpose, not overly broad in its application, and implemented in conjunction with procedural safeguards, will not be considered a violation of the antitrust laws.[266] Other courts have reviewed self-regulatory association rules under a rule of reason analysis without reliance on the *Silver* rationale.[267] The acceptance of this type of exception to an automatic application of the per se rule has been justified both on the basis that associations are entitled to implement rea-

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[263] *See* cases cited note 258 *supra*. For two interesting but conflicting analyses of the advisability of considering noncommercial motive when judging conduct challenged as a concerted refusal to deal see Bird, *supra* note 104 (pro a limited per se rule), and Coons, *supra* note 21 (pro the rule-of-reason approach).

[264] *See* Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260, 1263–66 (N.D. Ga. 1973). For a review of the *Blalock* decision see Mayne, *supra* note 188, at 784.

[265] *See* Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260, 1266–68 (N.D. Ga. 1973). *See also* Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118, 138 (S.D.N.Y. 1972).

[266] *See, e.g.*, McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008, 1017–18 (S.D. Ill.), *aff'd*, 506 F.2d 1404 (7th Cir. 1974); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1064–66 (C.D. Cal.), *issuance of injunction aff'd sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971). *See generally* Comment, *supra* note 138. One author advocates the rejection of noncommercial purpose as a defense and favors the application of the per se rule with one qualification—the reasonable rule and regulation exception. Bird, *supra* note 104, at 288–92.

[267] *See, e.g.*, Mackey v. National Football League, 1976 Trade Cas. ¶ 61,119, at 70,064, 70,072–76 (8th Cir. Oct. 18, 1976); Florists' Nationwide Tel. Delivery Network—America's Phone-Order Florists, Inc. v. Florists' Tel. Delivery Ass'n, 371 F.2d 263, 267–70 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967); Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165, 170 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); Lowe v. International Air Transp. Ass'n, 1975 Trade Cas. ¶ 60,668, at 67,928–29 (S.D.N.Y. Jan. 9, 1976); Kapp v. National Football League, 390 F. Supp. 73, 80–82 (N.D. Cal. 1974); Molinas v. National Basketball Ass'n, 190 F. Supp. 241, 243–44 (S.D.N.Y. 1961).

sonable regulations in order to govern their affairs as long as any restraining effect is only incidental and also because of the uniqueness of a particular industry.[268] Such regulations have sometimes been found invalid because procedural safeguards have not been afforded to the party complaining of their restrictive and anticompetitive effect, while, in other instances, the regulations have been found to be so restrictive that they were held illegal under a rule of reason analysis.[269]

Because the application of the noncommercial purpose theory is seen most frequently in cases involving association rules and regulations, there is a conceptual overlap between that theory and the reasonable rule and regulation exception. There is no such overlap, however, in situations in which a commercial restraint is alleged. This is because the application of the reasonable rule and regulation exception has not been confined to a noncommercial setting, but has been applied when the regulation in question has been promulgated by a business combination.[270]

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[268] For cases stating that associations may implement reasonable regulations governing their affairs see, *e.g.*, Florists' Nationwide Tel. Delivery Network—America's Phone-Order Florists, Inc. v. Florists' Tel. Delivery Ass'n, 371 F.2d 263, 269–70 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967); Molinas v. National Basketball Ass'n, 190 F. Supp. 241, 243–44 (S.D.N.Y. 1961). *See generally* Comment, *supra* note 138, at 1492–97.

For cases that have refused to automatically apply the per se rule because of the unique nature of the professional sports industry see, *e.g.*, Mackey v. National Football League, 1976 Trade Cas. ¶ 61,119, at 70,072–76 (8th Cir. Oct. 18, 1976); Kapp v. National Football League, 390 F. Supp. 73, 80–83 (N.D. Cal. 1974). For a discussion of the various problems of the professional sports industry see Sobel, *The Emancipation of Professional Athletes*, 3 W. ST. U.L. REV. 185 (1976).

[269] For cases in which the absence of procedural safeguards has been the ground upon which illegality has been premised see, *e.g.*, Lowe v. International Air Transp. Ass'n, 1975 Trade Cas. ¶ 60,668, at 67,928–29 (S.D.N.Y. Jan. 9, 1976); McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008, 1018 (S.D. Ill.), *aff'd mem.*, 506 F.2d 1404 (7th Cir. 1974); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1066 (C.D. Cal.), *issuance of injunction aff'd sub nom.* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971). *See generally* Comment, *supra* note 138, at 1508–10. It is interesting to note that one author has drawn a distinction between eligibility rules which result in a primary boycott and those which result in a secondary boycott, concluding that rules producing the latter effect should be subject to the per se rule. *See* Anderson, *supra* note 239, at 82–85, 90.

For cases in which the rule of reason has been applied but the challenged practices have been found illegal because they were so restrictive see, *e.g.*, Mackey v. National Football League, 1976 Trade Cas. ¶ 61,119, at 70,072–76 (8th Cir. Oct. 18, 1976); Kapp v. National Football League, 390 F. Supp. 73, 80–83 (N.D. Cal. 1974).

[270] *See* Florists' Nationwide Tel. Delivery Network—America's Phone-Order Florists, Inc. v. Florists' Tel. Delivery Ass'n, 371 F.2d 263, 267–70 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967).

CONCLUSION

In describing the law relating to group boycotts, one commentator has observed that "[t]he law in Washington . . . is quite different from the law in the rest of the country."[271] Although the Supreme Court has consistently held group boycotts unreasonable and has more recently condemned them as per se unreasonable, it has made generalized, all-inclusive pronouncements, thereby creating confusion in the lower federal courts. In order to avoid the application of the per se rule, the lower federal courts have focused upon the ambiguities of the Supreme Court decisions. Whatever conclusions are drawn as to the proper standard to apply to group boycotts, it can be fairly concluded that the Supreme Court has failed to sufficiently define the term group boycott and has failed to delineate the perimeter of the per se approach as applied to concerted refusals to deal. In view of the consistent refusal by the lower federal courts to apply the per se rule to restraints challenged as group boycotts, it would seem that a reevaluation of the per se rule as applied to such restraints is in order.

Before considering the relative merits of a per se approach or a "rule of reason" standard, the philosophies behind each should be examined.[272] Analyzing the concepts in their most simplistic terms, it can be generalized that the rule of reason protects those contracts and combinations which are basic to our economic system by allowing an examination of all of their effects and ramifications so that they will not be struck down without an enlightened balancing of their relative benefits and evils.[273] The per se rule, on the other hand, is applied to those restraints which, over a period of time, have been found to be inimical to a competitive system. This rule not only aids in predicting what conduct is permissible but also acts as a deterrent in that no reason or explanation will excuse or justify conduct which is subject to the rule. The application of such a standard frees the courts of the burden of extensive fact-finding analysis and of the dif-

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[271] Woolley, *supra* note 13, at 774.

[272] For an interesting discussion by a proponent of the rule of reason concerning the "tug of war" between the rule of reason and the per se rule see Oppenheim, *supra* note 7, at 1148–65. In response to Oppenheim's discussion see Adams, *The "Rule of Reason": Workable Competition or Workable Monoply?*, 63 YALE L.J. 348, 348–61 (1954).

[273] *See generally* Board of Trade v. United States, 246 U.S. 231, 238 (1918); 71 HARV. L. REV. 1531, 1535–36 (1958). For a discussion of the rule of reason see 2 HANDLER, *supra* note 2, at 763–67; Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 1), 74 YALE L.J. 775, 781–847 (1965); Loevinger, *supra* note 5.

ficult economic examination inherent in the application of the rule of reason.[274]

When analyzing the standard that should be applied to a typical termination-of-distributorship situation which is challenged as a concerted refusal to deal, it should be noted that the application of the rule of reason to this alleged restraint of trade is probably not contrary to Supreme Court precedent. The Court has broadly stated that motivation is not relevant when "businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public."[275] It has never, however, directly considered the impact of a restraint which takes the form of a pure vertical refusal to deal in cases not involving resale price maintenance. Under certain conditions, though, the Supreme Court has approved in dictum an exclusive dealing arrangement, the implicit result of which is the engagement of one distributor to the exclusion of another distributor.[276] In most instances, except those involving new businesses, this necessarily results in the termination of the present distributor.

Except in the area of price-fixing, it is doubtful that the Court would classify such a restraint as per se unreasonable, in view of the position taken regarding the difference in the market impact of a vertically imposed restraint. To do so would substantially infringe upon the freedom of a businessman to market his goods in what he believes is the most practical, economical, and efficient distribution system. As has been hypothesized by some lower federal courts, to hold such an arrangement per se unreasonable would be to burden every manufacturer with its current distributors regardless of their efficiency.[277] Such a holding also would suppress competition by effectively

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[274] *See generally* United States v. Topco Associates, Inc., 405 U.S. 596, 607–12 & n.10 (1972); Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 2), 75 YALE L.J. 373, 377–87 (1966); Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165, 1166 (1964); 71 HARV. L. REV. 1531, 1535 (1958). *See also* 1 HANDLER, *supra* note 2, at 59–65, wherein the author urges that the rule of reason should be the general rule and that the per se rule should be used only in limited situations. For a discussion of the origination and evolution of the per se rule see Van Cise, *supra*; Von Kalinowski, *The* Per Se *Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A.L. REV. 569 (1964).

[275] United States v. General Motors Corp., 384 U.S. 127, 146 (1966).

[276] For a discussion of exclusive distributorship arrangements see note 249 *supra*.

[277] *See, e.g.*, Bushie v. Stenocord Corp., 460 F.2d 116, 120 (9th Cir. 1972); Cartrade, Inc. v. Ford Dealers Advertising Ass'n, 446 F.2d 289, 294 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972); Knutson v. Daily Review, Inc., 383 F. Supp. 1346, 1360–61 (N.D. Cal. 1974), *modified*, 401 F. Supp. 1374 (N.D. Cal. 1975). *See also* Schwing Motor Co. v.

prohibiting distributors from soliciting business from manufacturers who have already established an independent distribution network. Thus, only by examining the intent, motive, and effect of a vertical termination and substitution, can it be determined whether the restraint is unreasonable.[278]

Aside from cases involving the termination of a distributorship, analysis of vertically imposed group boycotts is difficult, as very few cases have confronted such conduct. Much of the prior analysis with regard to the vertical termination and substitution of a distributor would be applicable. Therefore, in view of the lack of experience in dealing with such restraints the application of the per se rule should be delayed until the market effect of such activity has received full consideration.

In situations other than those involving vertically imposed restraints, analysis and conclusion are still more difficult. Although the Supreme Court has not been presented with a group boycott imposed by an association with essentially noncommercial objectives, it has held that trade associations which have effectuated concerted refusals to deal are subject to the per se rule regardless of the motivation. The difficulty in applying the per se rule to the noncommercial aspects of nonprofit educational or athletic association regulations is that it would effectively abrogate a variety of rules or regulations, some of which may be necessary to the survival and successful operation of such an association. For example, an association would be seriously hampered in its enforcement of disciplinary measures necessary to promote the standards and objectives of the association. In order to accommodate the salutary goals of various nonprofit associations and the objectives of the antitrust laws, it may be necessary to distinguish between the commercial and noncommercial regulations of, or conduct required by, such associations.[279] Under such an approach, if a rule were implemented in order to further the noncommercial objectives of the association, it should be evaluated in terms of the rule of reason. If the rule were implemented to further commercial objectives, it is arguable that a different standard should apply. In any event, in this latter situation, the same standard should be applicable

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Hudson Sales Corp., 138 F. Supp. 899, 906–07 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

[278] *See* Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 MICH. L. REV. 671, 683–85 (1966). *See generally* Bohling, *supra* note 125, at 1203–23, 1240–41.

[279] *See generally* Bird, *supra* note 104, at 274–92 (advocating per se rule with an exception); Coons, *supra* note 21, at 746–55 (advocating rule-of-reason approach).

as to any other horizontal concerted refusal to deal imposed under the auspices of a business-oriented combination.[280]

Often implicit in the area of noncommercially directed restraints is the self-regulatory aspect of the rule or regulation. When dealing with nonprofit educational or athletic associations, the challenged conduct will often be both self-regulatory and noncommercial. Thus, in the noncommercial area, the reasonable rule and regulation exception should be considered.[281] This exception would be relevant in considering the reasonableness of the alleged restraint. In effect, this exception would impose upon the associations, with regard to their enforcement of their own rules and regulations, something similar to the notice and hearing requirements of procedural due process. If it were determined that noncommercially motivated refusals to deal were to be evaluated under the rule of reason, the requirement that procedural safeguards be afforded would allow the courts to consider the challenged restraint under a standard which would provide the flexibility of the rule of reason, but which would allow the court to escape extensive economic and factual analysis in the event that the regulation had been applied without some procedural safeguards or was not reasonably related to a legitimate purpose. Therefore, when dealing with conduct which is motivated by and directed toward noncommercial considerations, a middle ground standard of review should be implemented. Under this standard the rule of reason would be the proper test, but if procedural safeguards were denied the object of the combination or the regulation was not reasonably related to a valid end, the restraint would be, in effect, considered per se unreasonable.

More problematical is the situation which arises when the self-regulatory conduct is implemented by a trade association. Because businessmen are involved, commercial considerations are usually paramount, thus causing any resultant combined conduct to be suspect. Any exceptions to the use of the same legal standard applicable to all business combinations should be narrowly drawn.[282] Generally, however, membership qualification requirements are, in all probability, necessary to the proper functioning of a trade association, but such regulations should be policed by the procedural safeguards pre-

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[280] *Cf.* Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258, 1263 (N.D. Fla. 1976).

[281] *See generally* Bird, *supra* note 104, at 288–92.

[282] For a different viewpoint see 51 NW. U.L. REV. 628, 635–38 (1956), wherein it is advocated that the rule of reason be applied when reviewing the self-restricting policies of trade associations. *See generally* Comment, *supra* note 138.

viously discussed. The professional sports industry may also be an example of an area in which special considerations should result in the application of the so-called "*Silver*" exception.

The situation in which it is the most difficult to achieve a viable resolution is that involving commercial restraints imposed by a horizontal or vertical-horizontal combination. In dealing with such horizontal and vertical-horizontal group boycotts, the Supreme Court has consistently held them unreasonable. In more recent cases, this conduct has been held illegal per se. Although the Court has never delivered an opinion containing an in-depth economic analysis of the inherent evils of concerted refusals to deal, it can be surmised that the Court views such restraints as epitomizing illegal restraints of trade.

The lower federal court decisions which have upheld, as reasonable, conduct which appears to exemplify a commercial concerted refusal to deal imposed by a horizontal or horizontal-vertical combination, make it abundantly clear that not all such activity necessarily results in the evils which the antitrust laws were designed to prevent. Although the rule of reason provides a means by which a court can condemn unreasonable restraints and uphold reasonable arrangements, such a standard makes it incumbent upon a court to analyze the economic impact of such conduct upon the market. This obligation forces the court to engage in complex analysis of market structure. Full comprehension of the market structure is crucial in order that the effect of the challenged activity upon the market can be judged within the context of the antitrust laws. Thus, inherent in the application of the rule of reason are certain problems which are not confronted by a court adopting the strict per se approach. The Supreme Court has stated that "courts are of limited utility in examining difficult economic problems."[283] It has further noted that a court's "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector," was one of the primary reasons for the formulation of the per se rule.[284]

Moreover, the application of the "rule of reason" approach to commercial boycotts imposed by horizontal and horizontal-vertical combinations would burden the court with a further obligation to scrutinize the purpose and intent of such a combination. Not only is

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[283] United States v. Topco Associates, Inc., 405 U.S. 596, 609 (1972) (footnote omitted).

[284] *Id.* at 609–10.

any standard which may be used to examine motive and intent extremely subjective, but it is not difficult to hide anticompetitive motives behind an argument that the conduct was in the furtherance of legitimate and reasonable business practices. Although it must be conceded that the application of the per se rule in this particular area may result in some innocent conduct being invalidated, the task of evaluating the multifarious facets of the market itself, the impact upon the market, and the motivation of the parties causes such invalidation to appear de minimis.